Insurance Counsel Journal

January, 1952

VOL. XIX NO. 1

WINTER ISSUE

Issued Quarterly by

International Association of Insurance Counsel

Eleventh Floor, Comer Building :: Birmingham, Alabama

Entered as Second Class Matter at the Post Office at Birmingham, Alabama

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1951-1952

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The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

When this issue of the JOURNAL reaches you the old year will have passed into history.

Let us all pray that the year 1952 brings world peace and that we have an end to the sacrificing of the youth of our country.

I hope you all had a Merry and Happy Christmas and sincerely wish that the New Year brings you both happiness and prosperity.

Speaking of Christmas and prosperity, I note that the Department of Agriculture is purchasing choice turkeys in order to keep the price up. Also the Office of Price Stabilization has raised the price of certain commodities too numerous to mention. Apparently these two Departments have gotten together. That seems like a good idea to me. I never could figure out why one Department of our Government spent millions to keep prices down, and another Department spent millions to keep prices up. It just doesn't make sense to me. No wonder the cost of living is going up and up!

Your Executive Committee is busy preparing for its Mid-Winter Meeting which will be held in Palm Springs, California, on January 15-18, 1952. Many important matters are on the agenda to be considered by your Committee. While the business affairs and policy problems of the Association are settled and determined by the Executive Committee no member should hesitate to make recommendations and suggestions. I can assure you they will be welcomed and given prompt and serious consideration.

JOSEPH A. SPRAY
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Insurance Counsel Journal
PUBLISHED QUARTERLY BY
INTERNATIONAL ASSOCIATION OF
INSURANCE COUNSEL

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The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

Subscription price to members $5.00 a year. Single copy $1.50

Entered as Second Class Mail Matter at the Post Office at Birmingham, Alabama

Vol. XIX January, 1952 No. 1

INVESTIGATION, SETTLEMENT VALUE OF CLAIM AND TRIAL OF ACTION
THE TEAM

As all readers of the JOURNAL are directly or indirectly interested in one or more or all of the above named subjects, to provoke discussion and exchange of views through the pages of the JOURNAL, I will here make a few observations, trusting that other members will contribute through the pages of the JOURNAL their thoughts, and that by exchanging ideas and experiences we all may profit, and the cause which we represent may be benefitted.

The first man on the scene of an accident when practicable should be the investigator or adjuster. He should make sufficient inquiry to visualize the accident, to reconstruct the happenings in his own mind, and to reach at least a preliminary conclusion as to whether or not the injured party was guilty of initial negligence, or was guilty of wantonness, and whether or not the assured was guilty of initial negligence, subsequent negligence, or wantonness. Now, having in mind the possible issues, he should proceed to take signed statements from all witnesses, including of course, that of the assured. I say that the adjuster should first try to visualize the accident before taking any statements, as I have found after many years of experience in the courts and in reviewing files of investigation that the investigator often takes statements from witnesses which really do not make sense and obviously could not be true, based on the physical evidence available to all.

If, after this is done, it seems a liability case, the claim should be immediately settled or an attempt thereat should be made at once. If it appears that the claim cannot be settled, then consideration should be given to the personality of the assured, his station in life, his appearance, his possible demeanor on the stand, his mental alertness, and also to the station in life of the claimant, his family and close connections. In my judgment, all of these factors must be considered in an attempt to determine the value of a claim or suit.

If the claim is not settled and an action is brought, when a complete investigation has been made the trial attorney, in preparing his case for trial, has a solid foundation on which to work. If the investigation has been made by a person who is not trained in the laws applicable to the case, and if complete statements were not taken from witnesses covering the vital questions which will be issues in the trial of the case, the trial lawyer begins his task with two strikes against him. The trial attorney and his staff should, as early as possible after a file reaches his office, endeavor to reinterview the witnesses whose names appear in the file and determine just how they will stand up under cross-examination, size up their personality and ascertain the possible impression they may make with a jury, and then attempt to estimate whether or not his chances before a jury warrant a trial, or whether or not the action is one for settlement.

To evaluate a claim and to recommend to the insurance carrier the value of a case, in my judgment, is one of the most difficult problems we trial lawyers are from day to day confronted with. There are many factors to be considered. The seriousness of the injury, whether it is permanent or only temporary, the personality of the plaintiff and his or her place in the community, whether or not he or she are members of any organization whose members might be on a jury, whether or not the defendant is a large corporation; whether or not it is popular in the locality where the trial is to be had, if the defendant is an individual, his standing in the community, how he would appear before a jury, whether or not the jury would be drawn to him favorably, or whether or not he is the type of person who would create animosity by his manner of testifying or by his position or connections. Then to be considered are the questions of law

applicable to the case. Whether or not the plaintiff was guilty of contributory negligence. If so, whether or not the severity of the injury and the personality of the plaintiff, or the child if a child is involved, is such that a jury would ignore the contributory negligence and say that although the plaintiff was guilty of contributory negligence it was not the proximate cause of the accident, or find some reason to hold that the defendant was guilty of subsequent negligence upon discovering the peril of the plaintiff, or was guilty of wanton conduct, as to which the plea of contributory negligence would not avail. Was the defendant guilty of any negligence—initial or subsequent or wantonness? Often it is found, according to the defendant's statement, that he was not guilty of any of the three. However, we may anticipate the plaintiff will have evidence of negligence, such as that either he was driving too fast under the existing conditions, or he failed to do something when he discovered the peril or should have discovered the peril of the injured person. After we have considered all of these factors, then we guess as to value. We guess as to whether the case should be settled for the sum offered by the plaintiff's attorney, or whether the case should be tried, and then hope that we have guessed right.

As an example of what I mean by guessing, I tried a personal injury case recently where the plaintiff was a very attractive red-headed woman. Her actual injuries were minor. Her built-up injuries, which were not really supported by the evidence, were, of course, more substantial. She owned the car; hence, any negligence of her husband, the driver, was imputed to her. She recovered a judgment for $8000.00. The judgment was so excessive that the trial judge reduced it to $3000.00. Shortly after this occurred, I tried the case in which the husband was the plaintiff. He received a broken neck, fractured vertebra, very painful injuries, at the time of the trial, some year and a half after the accident, he was still wearing a neck brace of metal. The evidence in both cases was practically the same. The jury in the husband's case remained out only a short while and returned a verdict in favor of my client, the defendant. Does this make sense?

Sometime ago I tried a case where a woman with a rather common name ran over an old negro woman who was attempting to cross the street. We had a mis-trial. Later I re-tried the case and obtained a defendant's verdict. Several days thereafter one of the jurors, who I was rather afraid was against me due to his station in life, met me on the street and asked me whether or not my client "Mrs. So and So" had insurance. I asked him why, and he stated that he thought he knew where this woman (my client) lived, and that as she was a widow and had a nice little cottage, and as he was not sure about insurance, he was unwilling to take that white woman's home away from her and give it to that negro woman. It was obvious to me that he was entirely mistaken as to the identity of my client as my client lived in a rather fashionable part of the city and did not live in the little cottage whose home might pass to the plaintiff as a result of a plaintiff's verdict.

I tried a case recently where a negro woman ran across the street. The evidence showed that she had been drinking and possibly was intoxicated at the time she was hit by a car at night. The jury returned a substantial verdict for this negro woman. I asked one of the jurors, who, by the way, is a representative in Alabama of a large group of insurance companies, why they decided for the plaintiff and why they brought in such a substantial verdict. He advised me that my client did not make a favorable impression, that the jury was convinced that he was lieing, and although they felt the negro woman was guilty of negligence, they were satisfied he was guilty of subsequent negligence, in that he should have avoided striking the pedestrian after he saw her or should have seen her.

I could go on and on naming cases which were either won or lost on account of the connections, station in life, and personalities of the plaintiff and defendant.

The adjuster, the investigator of the facts of the accident, the trial attorney under the guidance and direction of the home office executive in charge of legal and claim matters are a team. If one member of the team falls down in the performance of his job, the team is defeated and the insurance company suffers.

I hope what I have said above will provoke discussions through the pages of the JOURNAL and that your Editor will have the privilege of publishing the views of home office claim directors, the views of trial attorneys, and also views on the investigation and adjustment of claims.

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Warn The Witness

JOSEPH H. HINSHAW
Chicago, Illinois

EVERY witness should be interviewed by the lawyer before the witness takes the stand. The lawyer's duty to his client requires him to prove the facts in a manner which will present the contentions of his client in the light most favorable to him, consistent with the ethics of the profession. The lawyer therefore should make the best use possible of every witness. On the other hand, the time of the court should not be occupied with the testimony of witnesses who have nothing material to add to the controversy.

No matter how tempting a situation may be, and no matter how desirous the client may be to win, the ethical lawyer will not suggest that a witness give false testimony, nor acquiesce in the presentation of such testimony, if the witness volunteers to furnish it. All lawyers, and especially the younger ones, are constantly confronted with the problem of what to say to the witness when he is interviewed prior to taking the stand.

A trial should not be a game of "play acting," but the weight of the testimony of every honest witness is greatly affected by his personal appearance, his attitude, his conduct, and his method of expression. What he says is frequently not so important as the way he says it. If the witness is too timid or too arrogant, verbose, or careless in expression, these tendencies should be pointed out to him. He will probably not be able to overcome his natural inclinations altogether, but he is almost sure to improve when his attention is called to any peculiar mannerism.

The witness will be dressed properly if he is so dressed that no one will remember what he wore while testifying. When a witness is so poor, or so careless that he does not present a pleasing appearance, then the lawyer should insist that the witness change his apparel in order that the jury will not find his appearance offensive. If the case is worth the time of a good lawyer, then the client should if necessary be asked to shoulder the expense of some kind of modestly priced raiment for the witness. The difficulty in most cases will arise with witnesses who insist upon overdressing. To most juries, cheap clothes are quite acceptable, if they are clean and pressed. The writer never hesitates to suggest to a lady that she refrain from wearing to court her loud jewelry, expensive fur coat, or large alligator purse with shoes to match and the like.

Presenting The Witness

The order of presenting witnesses is important. Most lawyers prefer to begin with a good witness, and certainly to end the case with a good witness. No proper choice can be made without seeing and talking to the witnesses.

How To Testify

Suggest to the witness that when he is called to take the oath, he avoid allowing his wrist to droop with his hand half closed. Tell him to hold his hand up with the palm well open, with all fingers extended, to look at the person who administers the oath, and to say, "I do," in a firm voice, so that all can hear. Ask him to look at the jury when he sits in the witness chair so that the whole jury can see his face. He should not meet them with a stare, but should present a frank appearance, with his full countenance turned to their view. He should be asked to remember that the jury decides the facts, that he must speak loud enough for all of the jury to hear, and that they can best hear him when he is looking in their direction. When the witness drops his voice or speaks in a very low tone, he may give the impression of one who knows he is not telling the truth and finds it difficult to tell the falsehood with a full voice.

If the testimony is to relate the facts of an occurrence, such as an accident, insist that the witness visit the scene again before testifying, even though he has been there many times before. If the testimony involves a street intersection, tell him to stand on the ground for a short while at each of the four corners: to observe the pavement, the manholes, the curbing, the parkway, the sidewalk, the buildings and their use, the street lighting, the trees, the bushes, the contour of the land and all

fixed objects. Tell him to close his eyes and see how much of it he can remember, and to try the process over and over at each of the four corners of the intersection. Where distances are involved, tell him to measure the distances so that he can give an accurate account. If he has not made measurements, his testimony should make it plain that the stated distances are only estimates. If the witness is not altogether oriented, a rough sketch should be used to help him orient himself. If a map is to be used in evidence, and shown to the witness in court, the witness should have an opportunity to see the map before he takes the stand, and to understand what the map represents.

A Question Is Not An Answer

Many witnesses are prone to answer one question by asking another. This will almost always start an argument, one which usually does not end in favor of the witness, who should understand that it is his duty to answer questions, and not to ask them.

It is well to warn the witness not to keep looking at the lawyer who has called him to the stand, as if he expected some signal as a hint to his answer.

Speeds And Distances

The witness should be warned not to estimate speeds and distances with definite accuracy unless they have actually been measured mechanically. No one can be absolutely accurate on a mere estimate of speeds or distances, and the witness should not pretend to be so. He should be cautioned to state that the figures which he is giving are merely his estimate and that he did not make measurements. He may, of course, insist that he believes his judgment is approximately right.

Respect For The Court

Tell him to show the utmost respect for the court and to stop talking the very moment the court utters a word; to pay close attention to any direction by the court and to carry out the court's order carefully. He should be cautioned to be polite even to his opponent, not to allow himself to argue with opposing counsel, and above all things, to be careful not to become angry, no matter how insinuating, or even insulting, the questions may be. Most witnesses can avoid anger if they are warned to avoid it, but this warning must be made with insistence.

Understanding The Question

Tell the witness to be sure to understand the question and that if the question is not perfectly clear, to ask that the question be restated, to take such time as is necessary to answer, but not to hesitate so long as to indicate that he is thinking of some way to change his real thought, or to avoid the question. Ask him not to be easily influenced by leading questions, and that, where a question suggests an answer which is partly true, to say implicitly what part is true and what part is not true. However, this should not result in quibbling over obviously unimportant points. Tell him to admit readily what is true, even though the answer appears to be detrimental to the facts which your client seeks to prove. If he is acquainted with the litigants, he should admit the acquaintance fully and without hesitation, in a manner indicating that he values the acquaintanceship. If he has talked with anyone about the case, lawyer included, he should say so frankly if he is asked about it.

Discovery Depositions

If a discovery deposition of the witness has been taken and transcribed, the witness should be asked to read it, or re-read it, before testifying. He should be told to admit the statements he made in his deposition, if he is asked about it. The lawyer should acquaint him with the form such a question will take, so that he will know in what form to answer.

Importance of Modesty

Any attempt by a witness to impress the jury with his own importance usually has the opposite effect, and the effectiveness of any witness is markedly reduced if the jury, because of any word or act, concludes that he is a smart aleck. Modesty, fairness and firmness are great virtues in a witness. A firm, "no sir," or "yes sir," is much more effective than an answer like, "absolutely," or "positively."

Expert Witnesses

Where an expert is presented, the attorney should know his qualifications and should ask such questions as will make it

necessary for the witness to recite them. The expert who has good qualifications but who has testified to them so often that he sings them off with a flourish is not likely to be as effective as the one whose testimony shows that he has the qualifications but is quite modest in his recital of them. An expert witness should be interviewed before testifying, should be informed of the subject matter to be covered and of the facts involved in a hypothetical question.

How To Answer Questions

Suggest to the witness that he answer each question in his own words by telling what the fact is, unless the question is one which must be answered with a definite "yes" or "no." When the witness answers yes, he may have one idea in mind while the jury and the questioner may have another, so that the answer really does not reflect what the witness has in mind. If the witness starts in his own words to testify to what the fact is, he will not erroneously approve the questioner's idea; he can only express his own. He should be free to correct a mistake in expression or a statement which is not fully clear or completely correct. He should merely say, "That is not exactly what I mean. What I mean is—," and then restate his answer.

If the witness does not know the answer to a question, he should state frankly that he does not know. No one person knows all about any occurrence. He should be warned, however, not to take a negative attitude, but should state all of the facts that he does know, if they are in answer to the question. He should be warned not to volunteer, but to stop when he has answered the question. The witness may think that the trial lawyer has forgotten to ask what the witness has in mind, and the temptation to volunteer is very strong; but the probability that the witness will volunteer something which will be detrimental is much greater than the probability that the lawyer will fail to ask about a fact that he should prove.

Suggest to the witness that if he thinks the lawyer has forgotten to ask about a material point, he can call the point to the attorney's attention upon leaving the stand. If it is a material point, which should be covered in the testimony, the court will usually allow the attorney to recall the witness to cover the forgotten fact.

The witness should be informed that he will not be allowed to guess, nor to say, "I guess," about a controversial fact. He should be told that, even though he is not completely certain, if he has been in a position to form a judgment, and has formed a judgment, then he may state what his judgment is. This applies to such things as distances, color, taste, texture, and many conditions, such as drunkenness. One who knows nothing about the subject could easily guess that the moon is made of green cheese, but this would not be evidence. One in a position to know, and who has formed a judgment, might well say, "My judgment is that the moon is not made of green cheese," or that "the moon is composed of approximately the same substances as are found on the earth." The judgment would be evidence.

The witness should also be warned against using such careless expressions as, "I think – I imagine – maybe–perhaps – probably – could be," and the like. Such words add nothing to the answer. They indicate that the witness is uncertain, guessing, or that he has not been trained to be accurate about anything. If such words do not cause the answer to be stricken from the record altogether, they weaken the force and the weight of the testimony.

Repeating Testimony

During the testimony of almost every witness, some of the evidence must be covered more than once, and the witness will seldom use the same words twice to tell the same story. However honorable the intentions of the witness may be, he may find it difficult to tell any story twice and tell it accurately each time. A skillful cross examiner, if permitted to do so, will go over and over disputed ground in the hope that a repetition by the witness will materially change the story. It often does. Sometimes it is because the witness is not telling the truth. Many times it is because the witness is not aware of how difficult it is to tell any fact or describe any condition twice, and do so without alteration. Many witnesses do not have at their command enough English words to express ideas accurately. English words have so many shades of meaning that they may easily be misused by a person educated in the language. If, during an interview, the lawyer finds the witness making a careless use of words to convey his meaning, then

the lawyer should tell the witness that he may have to tell the story more than once and that he must be careful to say exactly what he means on each occasion.

Trick Questions

In almost every case certain trick questions are used, such as, "Did you talk to anybody about this case?" and, "In how many feet can you bring your car to a stop?" If he has talked to anyone, including the lawyer, he should say so. If he does not know in how many feet he could bring his car to a stop, then he should be informed concerning the indisputable scientific facts on the subject. A frequent trick question is, "Now, that is all you know about the occurrence?" The witness is likely to say, "Yes," and then find that there are many other things that he knows about the occurrence if he were asked, or when his recollection is refreshed. The better answer for the witness to make is, "That is all I now recall about it."

Insurance

In those jurisdictions where the jury is not informed of insurance, the witness should be told not to mention insurance in any form. He should be told that the case on trial is Jones v. Smith, and that the insurance company's name does not appear in the litigation. He should be warned against trick questions such as, "To whom did you make a report?" To such a question the witness is likely, without thinking, to say, "I reported it to the insurance company, or to the insurance lawyer." Another question designed to bring out insurance, where the witness has signed a statement, is, "For whom did you make the statement?" The witness of course is likely to say, "For the insurance company or for the insurance adjuster." He can be just as truthful in saying that he made out the statement for the lawyers who were to try the case. He should be informed that neither side has a legal right to bring out the question of insurance, and that the bringing out of the question of insurance, before a jury, is likely to cause a mis-trial.

The Tired Witness

Most witnesses need to be warned not to show fatigue as the result of long questioning. Tell the witness that opposing counsel may try to tire him out. One who is warned that he must run a mile race will take long easy strides, which will leave him in a condition to make a proper finish.

Many witnesses who have great physical strength and are not accustomed to mental battles, easily become tired and disgusted with repeated questioning. While the attorneys are accustomed to the process and can continue with it hours on end, many witnesses will experience such mental fatigue that they will answer yes or no, contrary to the fact, if they think that such an answer will put an end to the questioning and get them off the witness stand.

Finally, suggest to the witness that no matter how poorly he may think he has done as a witness, he should not reveal that feeling to the jury. He must not leave the witness stand like a whipped puppy. Tell him to leave the witness stand with his chin up, with a smile on his face, if the subject matter at all warrants it, and with an expression which indicates that he knows he has told the truth and expects everybody to believe it.

Liability of Insurer for Excess Judgment—Negligence or Bad Faith?

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THERE seems to be an increasing tendency on the part of an insured to demand that his insurer settle the claim or litigation when settlement can be made within the policy limit. If the insurer fails or refuses to settle the insured threatens to hold the insurer liable for any judgment that exceeds the policy limit. What is the reason for this? Is it because insurers are lax in the discharge of their

obligations under the liability insurance contract? I submit that possibly with few exceptions this is not the answer. Is it because lawyers are becoming more aware of this possible way of protecting the insured's assets in excess of the policy limits? Perhaps, although that is difficult to comprehend when we realize there have been decided cases on this subject for more than a quarter of a century. Or is it because of collusion between the plaintiff and defendant? Too often this appears to be the answer.

Let us analyze this matter to determine its merit. The insurance policy is a contract and the usual rules of contract law apply thereto. Both parties, insured and insurer, have rights and obligations thereunder. In the standard liability policy, subject to the limits of liability stated therein, the insurer agrees "to pay on behalf of the insured all sums which the insured shall become *legally obligated* to pay as damages . . . caused by accident." (Emphasis added). This language is not ambiguous. Nothing contained therein obligates the insurer to pay until the insured has become "legally obligated" to pay — in other words, after final judgment.

The next insuring agreement that has a bearing on this subject is that pertaining to "Defense and Settlement." In the standard policy the company agrees to "defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent, but the *company may* make such investigation, negotiation and settlement of any claim or suit *as it deems expedient*." (Emphasis added). This is plain, unambiguous language but it is this insuring agreement that has been used as the basis for recovery of an excess judgment from the insurer, in most instances, and that in spite of the preceding insurance agreement above quoted in part.

The cases allowing recovery of an excess judgment from the insurer are divided into two main classes—those decided under the so-called "Negligence Rule" and those decided under the "Bad Faith" rule. We shall eliminate those cases wherein recovery was allowed because of fraud. I doubt that anyone would argue that a company guilty of fraud should not be liable for an excess verdict.

The "Bad Faith" rule is spoken of usually as the majority rule although Appleman, as far back as 1938 refers to the rule of bad faith as "The old majority rule which is now rapidly becoming the minority rule" (26 Kentucky Law Journal 100, January, 1938).

What is the distinction between the "Bad Faith" rule and the "Negligence" rule? It is mostly one of degree. For example, the Wisconsin court in *Hilker v. Western Automobile Insurance Co.* (1935), 204 Wis. 1,235 N. W. 431 held the insurer to the exercise of good faith but defined good faith in terms of negligence:

"So it seems to us that . . . a good faith decision on the part of the insurance company upon the question of settlement must be preceded by the exercise of that degree of care and diligence which a man of ordinary care and prudence would exercise in the investigation and adjustment of claims."

The Supreme Court of Vermont expressed the importance of the element of intent as a factor evidencing bad faith. In *Johnson v. Hardware Mutual Cas. Co.*, 108 Vt. 269, 187 Atl. 788, 796 (1936) it said:

"Bad faith is an intentional tort of an active and affirmative nature. . . . It means with actual intent to mislead or deceive another. It refers to a real and active state of mind capable of both direct and circumstantial proof. It will not be imputed unless there is something in the particular transaction which is equivalent to fraud, actual or constructive." Intent is generally absent in the negligence test.

Let us examine for a moment the New Hampshire case of *Dumas v. Hartford Accident and Indemnity Co.*, 92 N. H. 140, 94 N. H. 484 (1947). Here, as in earlier cases which are mentioned in the opinion, the court applied the "Negligence" rule. In the underlying case of *Moran v. Dumas*, 91 N. H. 336, clearly a factual issue was involved and the injuries were serious. The special damages were $2,971.50. Against a policy limit of $5,000, the plaintiff offered to settle for $4,000, subsequently increased to $4,500 and just before trial and again during trial it could have been settled for $4,750. The opinion states the Company placed a value of $2,000 or $2,500 on the case and never raised it prior to verdict. In speaking of the duty of the insurer the Court said:

"The standard of care is at least what a reasonable man would exercise in the management of his own affairs. Since a liability insurer has absolute control over any negotiations for a settlement or compromise

of claims against the insured, some courts have adopted the rule that insurer will be held to that degree of care and diligence which a man of ordinary care and prudence should exercise in the management of his own business." 8 Appleman, Insurance Law and Practice, s. 4713, P. 80. In other words. in deciding whether or not to settle, the insurer must be as quick to compromise and dispose of the claim as if it itself were liable for any excess verdict."

The court said further: "Something more than an act of judgment is involved in the decision of the insurer to stand trial or to settle. So far as its interest is concerned, there must be a willingness within the policy limit reasonably to spend its money in purchasing immunity for the insured. Due care must be exercised in ascertaining all the facts of the case both as to liability and damages, in learning the law and in appraising the danger to the insured of being obliged to pay the excess portion of a verdict. While the insurer has a reasonable right to try its case in court, it cannot be unduly venturesome at the expense of the insured. The caution of the ordinary person of average prudence should be employed."

Under the facts in the Dumas case would the New Hampshire court have reached a different conclusion if it had applied the "bad faith" rule? I think not.

Texas is another leading exponent of the "Negligence" rule. This doctrine as enunciated in the earlier case of *Stowers Furniture Co. v. American Indemnity Co.,* 15 S. W. (2nd) 544 (1929) has been reaffirmed in the recent case of *Highway Ins. Underwriters v. Lufkin,* 215 S. W. (2nd) 904. This latter case went even further than the Stowers case. The court held that "the standard of conduct governing insurer in Texas is much stricter than is the standard of good faith" required of the insurer in other jurisdictions; that in Texas the "standard of conduct to be followed by insurer is *due care* . . . which a man of ordinary care and prudence would exercise in the management of his own business." Furthermore, the fact that "insurer had benefit of counsel (who had advised against settlement) is not controling." What is probably even more important, the court said it was immaterial that insured, even though he was cognizant of settlement opportunities, had not requested his insurer to effect settlement.

Although Texas elected to apply the "Negligence" doctrine, I think that a careful reading of the facts in each of the above cited cases would lead one to believe that the same results could be reached under the "Bad Faith" rule.

In *Mendota Electric Co. v. New York Indemnity Co.,* 175 Minn. 181, 184, 221 N. W. 61, quoted with approval in *Lawson and Nelson Sash and Door Co. v. Associated Indemnity Corp.,* 204 Minn. 50, 282 N. W. 481 (1938), the Supreme Court of Minnesota said:

"It takes something more than mere mistake to constitute bad faith, particularly with respect to the action of an insurer under a policy of public liability which is not absolutely bound to make a settlement. The right to control negotiations for a settlement must of course be subordinated to the purpose of a contract, which is to indemnify the insured within the contract limit. But it takes something more than error of judgment to create liability. *There must be bad faith with resulting injury to the insured before there can be a cause of action.*" (Italics supplied).

In holding that the insurer is not required to possess a "gift of prophecy" the Kentucky court in *Georgia Casualty Co. v. Mann,* 242 Ky. 447, 46 S. W. (2nd) 777 said:

"The gift of prophecy has never been bestowed on ordinary mortals, and as yet their vision has not reached such a state of perfection that they have the power to predict what will be the verdict of the jury on disputed facts in a personal injury case. . . . Calling it negligence for an agent not to divine what would be the result of a jury trial on disputed evidence, and permitting a jury to determine the question not solely on the facts as presented to him, but in the light of the subsequent verdict of the jury, would carry his responsibility beyond the bounds of reason and further than the demands of justice require."

The New York Court of Appeals in *Best Building Co. v. Employers Liability Assurance Corp.,* 247 N. Y. 451, 160 N. E. 911 (1928) rejected the "Negligence" doctrine in favor of the "Bad Faith" doctrine in the following words:

"We may ask what would constitute negligence in the failure to settle a case, as distinguished from bad faith. Even when there was little likelihood of recovery, many reasonable persons would think it wise to settle rather than to take any chance with a jury. In most of the acci-

dent cases, disputed questions of fact arise. Is the insurance company to determine at its peril whether reasonable minded men would believe the plaintiff's witnesses in preference to its own? Again, in conceded facts, as frequently happens, a serious question of law arises as to the nature or extent of liability, if any. Is a jury to say that the insurance company was guilty of negligence in choosing to try out such a question in the courts rather than to settle? These questions suggest the wisdom of adhering to the contract of insurance which the parties have made." This case is still the law of New York.

Some courts have said that "Bad faith is a species of fraud and evidence to sustain it must be clear, satisfying and convincing." This is a sound approach to the rule. We, who have selected insurance claims as our vocation, well know that the insurer should use due care in the handling of claims and suits against its policy holders. Care and diligence should be exercised in obtaining the facts and after the facts have been obtained the claim or suit should be evaluated on its merits.

Those companies that have Home Office control of claims and suits should seek the advice and recommendation of the field Claim Representative and attorney (if the claim is in suit), to be considered along with their own opinion. Each should use his best judgment whether to settle or not to settle and how much should be paid in compromise. When the insurer is arbitrary or capricious. and when it makes decisions regardless of law or fact, any of which result in detriment to its insured, it is not unreasonable to hold the insurer liable for an excess judgment. Call it negligence or bad faith, the result would probably be the same.

How can the insurance companies, in good faith, meet this challenge? An important point to bear in mind is that the insured alone elected to limit his protection under the policy. He paid a premium based, in part, on the policy limits he purchased. For a relatively small additional premium he could have purchased higher limits. Does he not, therefore, take a business risk when he limits the amount of his protection? I believe that the answer to this question should be in the affirmative, but practically nowhere have I seen the courts make any such comment, nor have they generally taken this into consideration.

It is contra to general policy, and the various State Insurance Departments would not tolerate it, for an insurer to seek contribution from its insured to a settlement that can be made within the policy limits. Appleman very aptly puts it, "as long as a settlement can be made within the policy terms, it is unjust and inequitable to force the policy holder to contribute." However, it would not be a violation of this policy, nor should it be considered unjust or inequitable, for the insurer to "open the doors," so to speak, for its policy holder to buy his peace for any liability he may feel he has in excess of the policy limit. This should be done without duress and without any urging by the insurer. This could be the practical solution to the problem. It would eliminate one of the arguments of the courts that the company, by the terms of the policy, has the sole right to settle or negotiate a settlement. That is correct but the intent is for this to apply to the company's liability under the policy. If an insured is worried that a verdict might exceed the policy limit, the insurer would not stand in his way if he desires to settle his liability for any excess judgment with the claimants. (See *McAleenan v. Company,* 159 N. Y. Supp. 401, 166 N. Y. Supp. 184; *City of Wakefield v. Company,* 246 Mich. 645; *General Accident v. Louisville,* 175 Ky. 96, 193 S. W. 1031; *St. Joseph v. Company,* 244 Mo. App. 221, 23 S. W. (2nd) 215; *Pickett v. Company,* 38 S. E. (S. C.) 160. On the other hand, where the insurer, in good faith, feels that there is a reasonable chance of a successful defense, or that there is a reasonable hope of a verdict for less than the policy limit, it should not be coerced into a settlement but should be entitled to its day in court.

There is one final item I wish to offer for consideration. That is the tendency of courts to submit to a jury whether under the facts of a given case the insurer was guilty of "negligence" or "bad faith" even though there is no evidence sufficient to raise an issue of fact. Too often a jury is likely to apply the "hindsight" formula. Then again, juries are inclined to disregard the facts and let "that rich insurance company" pay. Perhaps there would be a different result if more people realized that it is the insurance buying public that actually pays. If more of our trial courts would have the courage of their convictions there would be more of these cases

decided as a matter of law than as one of fact. The syllabus to the opinion in the Minnesota case of *Lawson and Nelson Sash and Door Co. v. Associated Indemnity Corp.*, supra, very aptly states:

"In this case, there being no evidence of bad faith but on the contrary good faith appearing affirmatively, the conclusion is inescapable that plaintiff failed to make out a cause of action, hence order of trial court refusing to grant new trial after directed verdict for defendant must be affirmed."

The burden of proof in such cases is on the plaintiff and it is up to him to produce evidence of bad faith or negligence. If no bad faith is shown, and if there is no evidence of negligence, then the question should be treated by the court as one of law and not one of fact. This would be a real improvement. When the courts have courage to express themselves upon these questions of law then equity and justice will be achieved for all parties.

Statutory Recognition of *Forum Non Conveniens*

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THIS paper will be an attempt to supplement the very fine article of Mr. Robert P. Hobson entitled "Change of Venue Under Section 1404 (a) USCA," which appeared in the January, 1951, issue of the Journal.

Mr. Hobson's article very clearly illustrates the need for statutory recognition of the doctrine of *forum non conveniens*. He likewise traces the work of revising the entire U. S. Judicial Code, particularly as it relates to the adoption of 28 USCA 1404 (a), which provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

This doctrine as it was recognized at common law is clearly and excellently treated in the case of *Gulf Oil Company v. Gilbert*, 330 U. S. 501, 67 Sup. Ct. 839, 91 L. Ed. 1055, and this decision has been a sort of guidepost for the Courts in construing 1404 (a). Prior to the adoption of this Section of the U. S. Code, the law of *forum non conveniens* was seldom applied because the only remedy was the rather harsh one of dismissal of the case.

The need for legislation to implement or codify the doctrine of *forum non conveniens* resulted from the hardships imposed upon many Defendants doing an inter-state business. The venue provisions of the Federal Employers' Liability Act, particularly, worked a hardship on the railroads. The FELA permitted an action to be brought in the District of the residence of the Defendant, or in the District where the cause of action arose, or in which the Defendant might be doing business at the time of commencing such action. Many railroads were sued at remote points from the scene of accidents and in Districts where they had no tracks or railroad facilities, but merely maintained offices for ticket sales, advertising or similar public relation purposes. Plaintiffs were shopping for convenient and favorable forums and the railroads, as well as other similar corporate Defendants, were being severely penalized.

In this article, we will take a look at a cross-section of the reported cases, in the hope that an analysis of these decisions will be of some working assistance to the members of the Association.

Transfers Granted

Since the venue provisions of FELA had caused so much inconvenience to railroads, it was only natural that they would quickly turn to Section 1404 (a) for relief. There are many reported decisions involving FELA cases.

Maloney v. New York, N. H. & H. R. Co., 88 Fed. Sup. 568: Plaintiff sued the railroad in the Southern District of New York to recover damages under FELA for death of her husband in an accident at Boston, Mass. The Defendant moved to transfer the case from New York to the Federal Court at Boston.

The Defendant stated in support of the motion that it needed a total of eighteen witnesses, seven of whom were not in its

employ, and all but one of its witnesses lived within a radius of 25 miles of Boston. Defendant estimated that three to four days would be required for trial of the action, and that if tried in New York, all of the eighteen witnesses would have to travel the 225 miles to New York and remain there a period of several days, involving incidental costs for room, board, loss of pay and travel expenses.

In opposition to the motion, Plaintiff argued that Defendant did a large business in New York and that the office of its general counsel was in New York City. The Court granted the motion and this decision points out the factors and circumstances which should be considered in deciding whether a case should be transferred.

Nunn v. Chicago, Milwaukee, St. P. & P. R. Co., 80 Fed. Sup. 745: This was another FELA case filed in the U. S. District Court for the Southern District of New York. Defendant moved to transfer the case to the District Court for the Southern District of Iowa, Central Division, where the injuries were received.

Defendant had no railroad lines in or near New York, but maintained a business office there. To defend the case in New York, Defendant would have to bring twelve witnesses a distance of 1200 miles from Des Moines, Iowa, and vicinity to New York at an estimated cost of $4,000 to $5,000, or approximately five times as much as trial in Iowa. The Court docket in the Iowa Court was current, and the case, if transferred, would be tried at the next ensuing term. The case was transferred.

Richer v. Chicago R. I. & P. R. Co., 80 Fed. Sup. 971: This FELA case was filed in the U. S. District Court for the Eastern District of Missouri. Defendant moved to transfer the venue to the U. S. District Court for the Western District of Oklahoma.

Plaintiff's injuries were sustained at Enid, Oklahoma, which is 540 miles from St. Louis, where the case was filed, although there is a U. S. District Court at Enid and also at Oklahoma City, 85 miles distant from Enid.

Except for medical testimony, all witnesses resided at Enid. Plaintiff did not state the number of witnesses he would require for trial. Defendant would have to take testimony of seven witnesses, all being beyond the subpoena power of the Court in Missouri, and only two of whom were employed by the Defendant.

Plaintiff was under the care of a physician in St. Louis, where he had been hospitalized. Plaintiff argued in opposition to the motion that there was only one eyewitness to the accident, and that he was under the care of physicians in the City of St. Louis.

The Court transferred the case, saying:

> "We don't believe the one circumstance that Plaintiff elected to go to St. Louis to obtain medical services approximately a month and a half after this case was filed, and after motion to change venue was filed is sufficient to outweigh other considerations that make trial of this case in Oklahoma a matter of convenience to both parties and witnesses, and in the interest of justice."

Conley v. Pennsylvania R. Co., 87 Fed. Sup. 980: Plaintiff sued the railroad in the Southern District of New York for injuries sustained while employed near Harrisburg, Pennsylvania. Defendant moved to transfer the case from New York to the Middle District of Pennsylvania.

Plaintiff was a resident of Harrisburg and injured near there. At least seven of Defendant's witnesses resided in Harrisburg, and two medical witnesses resided in Philadelphia and another medical witness in Baltimore.

Plaintiff urged that two of his doctor witnesses resided in Philadelphia and another in Baltimore. No witness was to be called who resided in New York City or vicinity.

The Court granted the motion, saying:

> "There is a preponderant balance in favor of the moving party, and this action should be transferred to the U. S. District Court for the Middle District of Pennsylvania."

There have also been a number of negligence suits for damages transferred under the Code.

In *Huff v. Nashville, Chattanooga & St. Louis Ry.*, 88 Fed. Sup. 735, Plaintiff filed suit against the Defendant in the Southern District of New York for damages for death of her husband in an accident near Belfast, Tennessee, which is located in the Middle District of Tennessee, and Defendant moved to transfer the case to that District.

Plaintiff's decedent was driving a truck on the highway when he collided with one

of the Defendant's trains. Plaintiff and her deceased husband were citizens of New York and filed suit there, approximately 1,000 miles from the scene of the accident. Defendant railroad was organized under the laws of Tennessee and has never done business in New York. All witnesses resided in Tennessee within fifty miles from where the Federal Court sits in the Middle District. Trial in New York would cost the Defendant an extra $3,000.

The Court granted the motion, saying:

> "The law which covers the substantive rights of the parties is the law of Tennessee where the alleged collision occurred. Under light of all the circumstances, it seems clear that the policy of Section 1404 (a) will be given expression by granting the motion. This, of course, means that a citizen of New York, who has the right of access to its Courts in an action against the Defendant, jurisdiction having been obtained, is nevertheless obliged to travel to a distant jurisdiction to try his claim. The language of 1404 (a), however, together with that of the revisor's notes, seems to indicate that such was the intention of the Congress. There can be no question here that the balance of convenience and the interest of justice favor the Defendant's motion."

Chaffin v. Chesapeake & Ohio R. Co., 80 Fed. Sup. 957: This action was originally begun in the State Court and removed by the Defendant to the U. S. District Court for the Eastern District of New York. Plaintiff sued for injuries received while walking across Defendant's tracks in West Virginia.

Defendant railroad was never licensed to do business in New York, although it had an office in Manhattan. Plaintiff, in his Complaint, alleged he was a resident of Kings County, New York. However, just prior to filing this suit, Plaintiff filed another suit in another Court in which he alleged he was still a resident of West Virginia, so Plaintiff's actual residence was open to question.

Defendant's affidavit showed that it would have to bring some six or more witnesses a distance of some 400 miles from the scene of the accident at considerable expense. It also showed that the Defendant could not bring its witnesses to New York on its own line. The case was transferred.

Walsh, et al v. Pullman Company, et al, 89 Fed. Sup. 762: Plaintiff filed suit against the Pullman Company in the Southern District of New York for injuries allegedly resulting from eating improper food in a dining car. Defendants moved to transfer from New York to Southern District of California, Central Division. Defendants' affidavit showed that all of its witnesses resided in Southern California and "that without the personal testimony of the Defendants' witnesses" they could not safely proceed to trial, and that it would be necessary for Defendants to bring all of its witnesses from California to New York at an expense of $5,000. It was also pointed out that the case would be tried sooner if transferred to California, than if left in New York. The case was transferred.

Many large corporate Defendants have used the Code to good advantage in monopoly anti-trust and patent suits. Typical of these cases are the following:

United States v. Gerber, et al, 86 Fed. Sup. 175: This was a case by the Government against the Defendants on a question of monopoly, and was filed in the Eastern District of Pennsylvania.

Defendants moved to transfer the case to Illinois where the Defendants' principal offices were located. Most of Defendants' evidence and witnesses were either in Chicago or in places in Indiana and New Jersey.

The Court transferred the case, saying:

> "The choice of venue in the interest of justice is actually determined by a preponderance of the facts in favor of either the Plaintiff or Defendant. . . . The Government should not be permitted to harass the Defendants by selecting some far off place for trial which would put the Defendants to unnecessary expense and travel in order to conduct their defense. Such harassing is an evil . . . which Section 1404 (a) of the revised Judicial Code is intended to correct."

United States v. E. I. Du Pont De Nemours & Co., 83 Fed. Sup. 233: This case was for an injunction for alleged violation of anti-trust laws, and was filed in the U. S. District Court for the District of Columbia. Defendant moved for a change of venue to the District of Delaware, where its principal place of business and offices were located. Defendant's witnesses and all of its records were in or near Wilmington, Delaware.

On the other hand, Plaintiff's attorneys claimed that the Government's witnesses resided in the District of Columbia, and argued that Washington, D. C., was within easy reach of Wilmington, Delaware.

The Court transferred the case, saying:

"No reason is perceived why this action should be brought and tried in the District of Columbia. Manifestly, it does not properly belong here. Delaware is the proper jurisdiction . . . the convenience of witnesses predominates in favor of the District of Delaware. . . . "

Greve v. Gibraltar Enterprises, 85 Fed. Sup. 410: This action was filed in the U. S. District Court for New Mexico under the anti-trust laws. Defendant moved for change of venue.

Defendant was a Colorado corporation with principal place of business in Denver, and all books, documents and witnesses were located there. The Court granted the change, saying:

"Time, expense and travel will all be saved by trial in the District Court of Colorado. Jurors of that District should have a far better understanding of conditions, circumstances and parties, than would a New Mexico jury."

Cinema Amusements, Inc. v. Loew's, 85 Fed. Sup. 319: This was an action for treble damages under the Sherman Anti-Trust Act, and was filed in the U. S. District Court for the District of Delaware. Defendant moved to transfer the case to U. S. District Court for the District of Colorado.

Plaintiff pointed out that Defendant corporations were all organized and doing business in New York and had offices there. Defendants admitted they were New York corporations and had offices there, but that the suit involved things which had happened in and near Denver; that all records and persons involved were located in Denver or its close proximity. Defendants estimated trial in Delaware would cost an additional $9,000 to $11,000 above the expense of trial in Denver.

The Court granted the motion, saying:

"Denver is clearly more convenient for Defendants, and no evidence indicates that Plaintiff has as much connection with Wilmington (Delaware) as even the Defendants have. The proximity of Plaintiff's counsel to Wilmington would appear to be Plaintiff's only real tie to Wilmington insofar as convenience is concerned."

Transfers Denied

The cases in which transfers have been denied are as varied and interesting as those in which transfers were granted. We will brief a few of these cases without attempting to classify the types of actions involved.

In the case of *Lucas v. New York Cent. R. Co.,* 88 Fed. Sup. 536, Plaintiff sued in the Southern District of New York for damages resulting from death in a grade crossing accident in Pennsylvania. The Defendant railroad was a consolidated corporation organized under the laws of New York, Pennsylvania, and four other States. The suit was filed originally in the Supreme Court of the State of New York, and then removed by the Defendant to the Federal Court on the grounds of diversity of citizenship. The Defendant then further moved to transfer the case to the Pennsylvania District where the accident occurred. Since Plaintiff was a citizen and resident of Pennsylvania and the Defendant corporation likewise was organized under the laws of Pennsylvania, the Court pointed out that if the transfer were made, there would then no longer be diversity of citizenship between the parties and the Federal Court would then be ousted of jurisdiction. The motion to transfer was denied.

In *Perry v. Atchison, T. & S. F. Ry. Co.,* 82 Fed. Sup. 912, Plaintiff filed suit in the Northern Division of the Southern District of California, asking for damages under Federal Employers' Liability Act. After the case had been set for trial, Defendant filed a motion to transfer the case to the Central Division of the Southern District of California. The Defendant's motion was supported by an affidavit of the Defendant's General Claim Agent, which recited the number of witnesses which Defendant expected to call, where they resided, and the miles they would have to travel if the case were tried in the Northern Division instead of the Central Division. However, neither the motion nor the affidavit disclosed the nature and importance of the testimony to be given by Defendant's witnesses. The Court denied the motion to transfer.

Tivoli Realty, Inc. v. Paramount Pictures, Inc., et al and *Adelman v. Paramount Pictures, Inc., et al,* 89 Fed. Sup. 278, involved companion cases brought

under the Sherman Anti-Trust Act and the Clayton Act in the United States District Court of Delaware at Wilmington. In each case, the Plaintiff was a resident of Texas. There were fourteen corporate defendants, ten of which were Delaware corporations and four New York corporations doing business in Delaware. Nine of the Defendants were doing business in Texas but five Defendants were not amenable to process in Texas. Defendants moved to transfer the cases to Texas and waived the question of some of the Defendants not being served in Texas by joining the Motion To Transfer. The Court did not agree with the Defendants' suggestion and said that 1404 (a) permitted transfer of a case to another District Court "where it might have been brought." The Court further observed that in all cases in which the doctrine of *forum non conveniens* comes into play, "it presupposes at least two forums in which the Defendant is amenable to process." The Court concluded, therefore, that it was without authority to transfer the actions to Texas.

In Ferguson et al v. Ford Motor Co., et al, 89 Fed. Sup. 45, suit was filed in the Southern District of New York for alleged violation of the Federal Anti-Trust Laws. Defendants moved to transfer the case to the Federal Court at Detroit, Michigan. The question was raised by the Plaintiffs that some of the Defendants were not subject to service of process in Michigan. The Court overruled this objection, saying:

> "No new process need be served when an action is transferred. . . . It is sufficient that the transferee forum be, and highly so, more convenient to all parties and witnesses, that it is proper venue as to at least one Defendant and that the other Defendants consent to the transfer."

The Court concluded that the movant must show a preponderant balance in his favor and only in exceptional cases should the transfer be made, and denied the motion.

The case of *United States v. E. I. Du Pont De Nemours & Co., et al,* 87 Fed. Sup. 962 was an action against Du Pont, General Motors, U. S. Rubber and several individual Defendants for alleged violation of the Sherman Anti-Trust Act and the Clayton Act. The suit was filed in the Eastern District of Illinois at Chicago. The Defendants moved to transfer the case to the United States District Court of Delaware at Wilmington. DuPont and General Motors are Delaware corporations. U. S. Rubber is a New Jersey corporation. However, these companies all had offices, sales agencies, dealers, suppliers and manufacturing plants in the Chicago area. The Chicago office of the Anti-Trust Division of the United States Government had initiated and conducted the investigation, and the entire personnel of the Chicago office of the Anti-Trust Division would have to travel to Delaware if the case were transferred there for trial. The activities of the Defendant companies are nationwide. The Court observed that transfer of the case from Chicago to Wilmington would probably cause as much inconvenience to some of the parties and their witnesses as it would convenience others. The Court denied the motion to transfer, saying:

> "To attempt to resolve the niceties involved in balancing the relative conveniences and inconveniences of all of the parties to any degree of certainty, resort must be had to an apothecary's scale and a crystal ball; neither of which implements are available to this court."

Plaintiffs' Use of 1404 (a)

Although Section 1404 (a) was designed primarily to relieve Defendants from trial of cases in inconvenient forums, yet it does not preclude Plaintiffs from asking for transfers and they have done so in a number of cases with conflicting results.

In *Barnhart, et al, v. John B. Rogers Producing Co.,* 86 Fed. Sup. 595, Plaintiffs filed a damage suit for injuries in Ohio. *Plaintiffs* then moved to transfer the case to the Western District of Pennsylvania, and set up in support of their motion the following:

1. All Plaintiffs reside in the Western District of Pennsylvania.
2. The injuries were sustained and all transactions set forth in the Complaint occurred in the Western District of Pennsylvania.
3. All of Plaintiffs' witnesses, over ten in number, reside in the Western District of Pennsylvania.
4. Bringing all Plaintiffs and their witnesses to Toledo, Ohio, would entail large expense, loss of time and earnings.

5. Plaintiffs were wholly without means to pay the expenses of bringing witnesses from Pennsylvania to Toledo.

The Plaintiffs did not file their motion to transfer until the case was called for a pre-trial conference. The Court observed that the motion was untimely filed but in view of the seriousness of Plaintiff's injuries, the Court would give consideration to the motion.

The Plaintiffs had also filed a suit against the same Defendant in the Western District of Pennsylvania but had been unable to secure service of process upon the Defendant and had instituted the suit in Ohio in order to obtain jurisdiction of the Defendant. The Court denied the motion, saying:

"It appears to the Court that the motivating reason for the enactment of Section 1404 (a) was to afford relief to a Defendant by placing him on a footing of equality with a Plaintiff in the selection of a forum for the trial of the case. If this be true, it would be improper to hold, in effect, that the Plaintiff's rights are enlarged thereby and that he may carry the Defendant about the country to a forum that best suits his convenience and do so by virtue of the Statute.

" . . . To allow Plaintiffs to transfer the case from a forum of their own choosing to a forum that they now believe to be a more convenient one for themselves and disregard the convenience of the Defendant would not be in the interest of justice."

Otto v. Hirl, et al, 89 Fed. Sup. 72: Plaintiffs filed suit in the Southern District of Iowa, obtained personal service on Defendants, and then *Plaintiffs* filed a motion to transfer the case to the District of Minnesota, as the automobile accident out of which the accident arose occurred in the Minnesota District. All of the witnesses except the Defendants resided in the Minnesota District, approximately 240 miles from Davenport, Iowa, where the case was filed.

It should be noted here that the case was commenced in Iowa by the Plaintiffs in order to obtain service on the Defendants, and then motion was made by the Plaintiffs to transfer the case back to the State of their residence and to the Court near the scene of the accident. Thus, the Court observed that the "defendants thus are the only persons who would be inconvenienced by a trial of this cause in the Minnesota District" where the accident occurred. The Court further concluded from a prior decision: "There is a local interest in having localized controversies decided at home."

The Defendants opposed the transfer saying that the case could not have been "commenced" against them in Minnesota within the meaning of 1404 (a), and, therefore, the Court had no authority to transfer it to Minnesota. Nevertheless, the case was transferred.

McCarley v. Foster-Milburn Co., et al, 89 Fed. Sup. 643: Plaintiff sued Defendants in the Western District of New York for the alleged wrongful death of Plaintiff's intestate from consumption of a food product made and distributed by the Defendants. Plaintiff moved to transfer the case to the Northern Division of the Southern District of California at Fresno as twenty-six witnesses for Plaintiff resided in and near California.

Defendants opposed motion by affidavit saying that the Defendants did not do business in California, had no officers or agents in California, no offices in that State, and that no valid service could be made upon Defendants in that State, which the Plaintiff admitted. Defendants intended to use expert witnesses in defense of the suit and California would not be a convenient forum to them. The Court observed that the residence of expert witnesses is not controlling in determining a convenient forum and transferred the case for Plaintiff.

In *Bolten v. General Motors Corporation,* 81 Fed. Sup. 851, Plaintiff filed a suit in Illinois for personal injuries sustained in Defendant's plant located in Missouri. The case was a common law action based on alleged negligence of the Defendant corporation. The Defendant asserted as an affirmative defense that the action was barred by the two year Statute of Limitations of Illinois and moved for a summary judgment. *Plaintiff* moved to have the case transferred to Missouri, where the accident happened, as that State has a five-year Statute of Limitations. The Court granted Defendant's motion for summary judgment and denied Plaintiff's motion to transfer, saying:

" . . . it should be remembered that the selection of the forum was Plaintiff's, and he should not now be per-

mitted to transfer the action indiscriminately. The Court is obliged to apply the law as it exists in this District and, when such is done, nothing remains which can be transferred to another District."

Multiple Transfers

One of the most interesting cases which has come to the attention of the writer is that of *Atlantic Coast Line R. Co. v. Davis,* 185 F (2) 766. In that case, Flora Davis, as Administratrix, began suit in the U. S. District Court for the Southern District of New York under the Federal Employers' Liability Act and sought to recover damages for the death of her husband while employed by the Defendant railroad. The Southern District of New York was a permissible venue for the suit. The Administratrix was a resident of the Southern District of Florida, as was her deceased husband. The fatal accident occurred in the Southern District of Florida. The Defendant moved to transfer the case to the Southern District of Florida. The case was twice tried before a jury in Florida and each time resulted in a mistrial, because the jury could not reach a verdict. After the second mistrial, Plaintiff moved the Florida Court for a re-transfer of the case to New York and the motion was granted by the Court. The railroad then sought a writ of mandamus in the Circuit Court of Appeals to prohibit re-transfer of the case to New York.

The Fifth Circuit Court of Appeals observed that "this is an extraordinary cause" and that the question for decision was whether or not 28 USCA 1404 (a) contemplated only one or plural transfers. The Court concluded that the order of re-transfer was an "unwarranted renunciation of jurisdiction" and issued a writ of mandamus directing the respondent Court in Florida to vacate the order of re-transfer to New York and to restore the case to the trial docket of the U. S. District Court for the Southern District of Florida at Jacksonville.

Prior to this, there was no decision upon the question of whether Section 1404 (a) authorized multiple transfers. Professor James William Moore in his "Moore's Commentary on the U. S. Judicial Code," says, at pages 210-211:

> " . . . if the motion to transfer is granted and the case is transferred to another District, this latter District should accept the ruling as the law of the case for it, and there should be no further transfer except under the most impelling and unusual circumstances."

Observations And Suggestions

We would like to offer for the benefit of the readers of the *Journal* a few observations and suggestions for handling cases involving a transfer under Section 1404 (a).

1. The Statute applies to any civil action in Federal Court, including actions which have been commenced in the State Court and removed to the Federal Court because of diversity of citizenship.

2. Although the Statute prescribes no time limit for the filing of the motion, it should be made as early as possible in the case, as several reported decisions show that motions were denied because they were untimely.

3. A case may be transferred to any other District or Division "where it might have been brought." There must be a preponderance or balance of convenience in favor of the movant before the motion will be granted.

4. The various decisions have listed the following factors for consideration in ruling on such a motion:

(1) Relative ease of access to sources of proof.

(2) Availability of compulsory process for attendance of unwilling witnesses.

(3) Cost of obtaining attendance of witnesses.

(4) Possibility of view of premises if appropriate to the action.

(5) Private interest of the litigant.

(6) Advantages and advisability of having the trial by lawyers and before a Court in a forum that is at home with the State law that must govern the case.

(7) Relative condition of the trial docket where the case is filed and where it is proposed to transfer the case, so as to determine whether the transfer will advance or delay actual trial of the case.

(8) All other practical problems that may make the trial of the case easier.

5. Most of the motions to transfer have been made by the Defendants, but a Plaintiff has just as much right to ask for the transfer as the Defendant if the facts warrant it and if the transfer is requested to a District or Division where the case "might have been brought."

6. The grant or denial of a motion rests clearly in the sound discretion of the trial Court and the order is interlocutory and should not be reviewed except in cases of clear abuse of this discretion.

The adoption of 1404 (a) has placed the matter of venue on a more convenient basis to all concerned. The need for the Statute is clearly illustrated by the great extent to which it has been used since it became effective on September 1, 1948. Reference to the decisions shows that many cases have been reported since the adoption of the Act. There must be dozens of other unreported cases, as for example, the writer has personally handled three such cases which have not been reported.

Most of the decisions show a rather uniform construction of the Code, as well as an effort to put it to intelligent and practical use.

How To Make An Investigation*

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THE first thing to remember is that someone else is going to look at the file to determine what the witness knows and what the witness would testify to in court. There is no purpose to write up something that the witness is going to say unwillingly or is not going to be the truth or is only going to be pretty close to the truth. There is no purpose in warping a statement to make it favorable to one side, your own, nor to mislead the witness in any way because this will absolutely double cross the trial attorney when he puts the witness on the stand if he has not had an occasion to interview the witness; or it will double cross the trial attorney when he interviews the witness a day or two before the trial. The trial attorney will have misapprehended the facts, made a faulty judgment as to settlement value. and probably messed himself up thoroughly with his client. Therefore, the primary thought in making an investigation is to get down exactly what the witness knows and what he will say in his own words whether it be good grammar or bad. The average young attorney in investigating a case supplies his college grammar instead of the grade school grammar of the unintelligent witness and it is perfectly evident to any person, including the jurymen, if that statement be submitted in evidence in an effort to impeach the witness that it is not the witness' statement, it is the statement of the investigator. The statement that is somewhat irregular, disorganized, and full of bad grammar is more likely a true statement of what the witness will say than one of these perfect collegiate themes.

The first thing to do in talking with the witness is to obtain his confidence and his respect; therefore, you must fairly state to him who you are and what your purpose is, and put him at ease so that he knows that you are expecting only the true facts from him and are writing down and expecting him to sign a statement expressing only those true facts. The minute you do anything smacking of sharpness you lose that witness' confidence and probably make him a witness for the other side, unconsciously. Be tactful.

As you talk to the witness, engage in some pleasantries to begin with and, in fact, throughout the interview, but it is unnecessary to write these pleasantries down nor is it necessary to write down the irrelevant remarks made by the witness. The average witness likes to talk and particularly likes to tell a bunch of irrelevant things that probably he really doesn't know anything about. He has a tendency to dramatize the situation and dramatize his position in that situation. Disregard all of this stuff and only write down and always hue to the point of the real issues and real points. Let the witness deviate but always bring him back to these main points and don't let him get away from these main points. Hold his feet to the fire on these main points until you get

*Reprinted from 21 Oklahoma Bar Association Journal 1346. (This was dictated in the presence of a young lawyer about to make an investigation.)

definite answers out of him. An answer that he doesn't know is a definite answer for a statement may be in negative form as well as positive form. If the witness didn't see or doesn't know, a statement to that fact will be useful to impeach him later on if he appears as a witness claiming that he saw or did know.

As you talk to the witness have him notice that you are slowly writing down the particulars. Start the statement out with something like this: "My name is John A. Smith. I live at 2414 N. Robinson Avenue, Oklahoma City. My telephone number is 6-8573. I work for the Barney-Stewart Lumber Company at 23rd and May Streets. I was standing—." He can see as you are taking this down that you are trying to get the definite particulars about him and how he can be reached and he will slow down a little bit while you are getting this information. Bring him up to the scene of the accident showing exactly where and at what time and on what day he was viewing this situation and something about how he happened to be there. Possibly he was on his way to work or going home for lunch, get that in there. Then have it state how he happened to be looking in that direction, or if he wasn't looking what caused him to look. Then do not try to lead him or push him in his first version of how the accident happened. Just let him say it the way he says it because that's the way he will say it on the witness stand regardless of all the coaching that is ever given him if he is an honest witness. So when he blurts out how it happened when you got him to the point of seeing the accident just write it just exactly like he says and say "Just a minute," and hold him off until you get it down just the way he described it the first time. After he has seen that you have done that his confidence will have gained and you can then open up the conversation further as to greater details of the occurrence.

Of course it is important to know what happened after the accident: where people were, what was done, who said what, etc. This should be covered if material. Naturally admissions by any party of fault would be material. Also information as to a row, or a fight, or the calling of the police or the ambulances, and whether it was one of the parties who did it, would be material.

When investigating an accident, it is necessary to get what information you can from the police department if in the city, or the sheriff's office, if they investigate it in the county, and from the state highway patrol, to the extent that you can get the information. Our recent experience has been that the city police department would not let one of our men see the driver's reports filed, but did let him see the report filed by the officer. The report filed by the officer is a mere bunch of conclusions and has no legal evidentiary value whatever and is inadmissible in court. All it is good for is to furnish us leads, unless it indicates what officers would testify as to skid marks, admissions, etc. Tactful handling possibly might enable us to see reports filed of drivers; if not, we would have to subpoena those papers for examination.

Obviously if you are going to interview the doctor of an injured person who is about to make a claim, he has no right to talk to you unless he has the permission of his patient. because it would be violating a privileged communication. Therefore you should keep yourself in the clear by obtaining such an authorization from the claimant; therefore, it is necessary to interview him first. Sometimes information can be obtained briefly from the hospital and sometimes, under the carpet, from the doctor; however, for a complete report, which need not be concealed, it should be done by permsision of the claimant.

The claimant should not be interviewed until you have had an opportunity to get the sense and feel of the entire case by investigating some of the circumstances and surroundings, having talked with your own client or assured and checked into the police records a little bit. Obviously in interviewing a claimant, with whom you may find it necessary to settle at a later date, the utmost tact must be used. The same thing applies with him as it does with the witness. He must have your confidence and respect. That is, he must respect you and have confidence in your desire to be fair and reasonable and honest toward him. You must not, however, commit yourself to him for any definite sum or for any definite liability. Preserve your role. You are merely investigating, you are not committing or admitting or promising directly, but you can do that by your careful, conscientious, and tactful manner inspiring respect and confidence.

When interviewing the claimant, if he does not have a lawyer, you certainly must

him feel at ease and you must be to convince him that you are taking down things exactly like he is giving them. So be patient and be slow and don't engage in any argument with him about who is right or who is wrong and don't try to defend your client or assured. All you are there for is to get this man's statement and nothing more. Be patient and kind and courteous and plodding and slow. Write up his statement just the same way you write up a witness' statement. Get on a separate sheet of paper a note from him that you have his permission to interview his doctor. Each of these should of course be signed.

As to signatures of witnesses and of claimants, usually as you are writing the statement the witness begins to notice that you are using only his words and unconsciously starts to dictate the report to you. Of course you must be careful because the expression of the statement loses some of its spontaneity, but you can cross question him and write up the conversation as he dictates in order to be sure that you are getting his exact words in writing up the statement. When you have finished the statement, ask him to sign it. If he won't sign it, ask him to initial it. If he won't initial it, write down at the bottom of it that you took the statement from him and sign your own name. Of course the date that it was taken should be stated. If you are a notary public you can thereafter put a jurat at the bottom of the statement if you have, before leaving, asked the witness "Do you swear that this is true?" You don't have to tell him that you are a notary public if you have asked him if he solemnly swears that it is true. Jurats should not ordinarily be used on statements but are very valuable, particularly when the investigator is a notary and is available for testimony in court.

In interviewing a police officer you must remember that he is a police officer for a particular reason, that is, that he is by nature somewhat of a bully and has been all of his life and prefers the police job at a lesser salary, with its strength, power and importance, to a job with a greater salary where he cannot inflict his personality and strength upon lesser people. Bear that in mind and show proper respect for the officer's importance and let him express his rough opinions, conclusions and prejudices at length, but stay with it until you find out what he really knows as distinguished from his bluster. A police officer ordinarily is reluctant to sign a statement.

It is advisable in making an investigation to keep your material and notes in order. To organize your material is important in any legal work; otherwise, your confusion produces inefficiency. You should keep yourself a running check list, posting to that sheet everything that occurs to you that you ought to investigate. This is a form of a coordinator that will pay off results fast. When there is documentary evidence, photostatic copies of documents, photographs, titles of automobiles, repair bills, etc., you should put these in a brown envelope and keep them in the file so that they will not be lost.

When you write up a statement it is advisable to do it on lined paper, preferably in the notebooks that I use. These notebooks are convenient for handling and there is enough space to write neat statements. If a witness must sign a statement that is on several pages, have him sign each page. When you return to the office, write up the statements on the typewriter on letter-size paper, single spaced, typing in the signatures as shown on the original, and staple the original typed statement on top of the original one in longhand. That will be the office copy of the statement and can be used for impeachment purposes. The typed copy stapled to it makes it easier for a court or for the trial attorney to read. The carbon copies can be furnished to client or the insurance company. When in doubt everything should be in triplicate.

In interviewing a doctor, all of these rules apply. It must be remembered that the doctor is busy, considers the matter a nuisance, and is interested in the payment of his bill. You must, of course, be careful not to make a commitment for payment of the bill, yet you can indirectly convince the doctor that a careful investigation is necessary in order to determine liability and whether there should be a settlement and that his patient and careful cooperation will be helpful toward that end. It is important to find out how the doctor was called in, by whom, and when, and to get the exact technical, medical phraseology in the report. If he will give you a typewritten report, so much the better, but you ought to get some kind of a report while you interview him. If his typewritten report is insufficient, stay after him and try to get further information, even though it be necessary by telephone. You

will of course furnish him the consent that the patient signed, in order that the doctor will talk freely to you. Besides getting the technical phraseology, you should get the practical phraseology. This is important for trial purposes in order that anybody can understand what the situation is. If there be X-rays, the readings on the X-rays should be obtained, if there is any question about the situation. A great difference is involved between interviwing and obtaining information from, a reputable physician as distinguished from one who habitually testifies for injured persons in damage suits. Some difficulties arise in these matters. You can only do the best you can. Tact will go a long way.

In making a report to your client or the insurance company, it is of course unnecessary to repeat these statements in full. We merely send copies to them. However, as you know what is in the statements, you can easily give a paragraph or two summarizing the high points of the statements of the witnesses, so that anyone examining the file can get the gist of the case without having to read the statements.

Remember always that there probably is something left on your check list to do. Then go ahead and do it. Remember always that there are points involving who owned the car, what the repair bill is, if the car can be repaired, who caused the car to be brought to the repair shop, whether the policy covers the car, and whether or not the presence of the insurance company should be revealed in the statements or in the interviews.

As to revealing presence of the insurance company, on trucks that operate by license of the corporation commission, the carrying of insurance is mandatory and the insurance carrier, by statute, can be joined as a defendant in the law suit. This is also true of busses. It is not true of passenger automobiles under the motor vehicle responsibility law or financial responsibility law, or otherwise. The rule to follow, generally, is to merely state that you are making the investigation for Mr. John Doe who had the accident last Saturday. If the doctor asks you point blank if you represent an insurance company, it is advisable to say that you do. And if the question comes up in any other way, you should not tell a lie or conceal the matter. If the claimant asks if you have insurance or if you are working for an insurance company, tell him the truth. In many instances it is unnecessary to volunteer this information. Under the terms of the insurance policy, it is the obligation of the insurance company to defend which means investigate and appear for the assured. You, therefore, are investigating the case for the insured and you are defending him and it is proper for you to say that you are investigating for him, defending for him, or you are the attorney for him.

War Damage Corporation and Its Meaning To Insurance Buyers

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THE subject of war damage is intriguing because of its chameleon-like characteristics. At first it appears to be so simple as to admit of little argument either as to principle or method. After further study it becomes so big and complex that one is tempted to dismiss it as an impossibility. Finally, after thoroughly analyzing the matter, some light appears and certain solutions present themselves.

I know that you are interested primarily in the question of how the whole subject of war damage indemnity affects you and the companies for which you act or to whom you are responsible. I believe that we can best approach the problem by considering first of all what comes within the scope of war damage indemnity, next its past history and finally its possible effects on our own particular problems.

You will note that I use the word "indemnity" rather than "insurance." I do this purposely because indemnification for war damage is not insurance as we com-

monly think of it. In fact, it is quite the opposite of the normal succession of events upon which ordinary insurance is established. For that reason it should not be confused with insurance or attempted to be justified on insurance principles and practices.

Broadly speaking, the subject of war damage indemnity can be divided into three principal headings—*injury to property, injury to person,* and *economic injury.* In general, the considerations affecting each one of these principal classifications is different and likewise its impact on your own respective problem will be different. For that reason, I propose to treat each separately so far as possible.

Before outlining the experiences of this country and others during recent wars, I would like to point out that the development of new weapons of war has complicated the picture to a certain extent. It is now virtually certain that no plan such as that followed by the War Damage Corporation in the last war will provide adequate premium income if several atom bombs or even one such bomb is dropped in the center of any one of several concentrated areas. For this reason we should not dismiss from our minds that it may be necessary for the Federal Government to levy a general tax so as to indemnify those whose property is injured or those who receive bodily injury. I will cover this subject more fully later on.

In order to get the complete picture, a little background of the experiences which have been encountered by other countries which have faced the same situation might be of interest. I would like first to give you a brief chronological summary of the experiences of some of these other countries with respect to indemnification of property damage.

Britain

Great Britain has conditions most nearly simulating those existing in this country and for that reason her experiences are particularly interesting.

In World War I Britain suffered relatively light homefront losses and there were no Government-sponsored war damage plans. Beginning in 1936, the private insurance companies refused to write war damage insurance on real and personal property. In 1937, the Government stated that it was of the opinion that no plan of insurance of property against war risk on land was feasible. In January, 1939, the Government partially reversed its position by adopting a plan whereby, although they made no firm advance commitments, they did provide for the recording of all losses with a promise that compensation would be paid on the highest scale possible after cessation of hostilities. This was followed in August, 1939, by another plan providing for the coverage of essential commodities.

The original position of the Government with respect to the impracticability of advance commitments for war damage indemnity was reaffirmed by the Weir Committee in October, 1939. They apparently were so impressed by the estimate of potential damage placed before them that they concluded that coverage for war damage to property was not a reasonable proposition.

During the winter of 1940 and 1941 Britain suffered the greatest bombing of the war and by late 1940 sufficient unrest had been created that the Government was virtually compelled to fill in the remaining gaps in the war damage coverage. This resulted in the War Damage Act of March, 1941, which provided indemnity for real and personal property. This plan was subsequently amended and finally repassed in 1943 and is still in effect.

All of the British plans, except the plan for insuring private personal property, were compulsory. The various plans covering personal property were supported primarily by premium payments with the Government committed to make up the deficits, if any. The premiums for real property were to be adjusted in such a manner as to divide the cost of the losses 50%-50% between premium payments and Government contributions. As a matter of interest, it might be said that as the plan finally worked out, the premiums paid about 20% and the Government paid 80%.

France

The French suffered considerable property damage in World War I and passed a War Damage Act with retroactive provisions in 1919. In the period from 1919 to 1940 a few unrelated and relatively unimportant acts were passed. In October, 1940, the first comprehensive French War Damage Act was instituted. It provided for the reconstruction of habitable real property including personal property contained therein. In 1942 a similar act was passed dealing with the reconstruction of indus-

trial and commercial properties. In 1946 the foregoing laws and several intervening amendments were integrated to provide a single law covering both real and personal property. The French plan contemplated reimbursement solely from the National Treasury with no collection of premiums and no issuance of policies.

Germany

So far as could be determined, the Germans had no War Damage Program in World War I. On September 1, 1939, they enacted a very comprehensive law providing compensation for real and personal property. This is still in effect and partially functioning. Like the French, the German plan calls for reimbursement solely from the National Treasury with no collection of premiums and no policies.

Canada

Canada adopted a War Damage law in October, 1942. This law provided for a voluntary premium-paying plan. Policies were issued under the law but few, if any, losses were incurred.

The United States

As you know, we had no War Damage Program during the first World War. Several states amended their laws to permit domestic companies to write war damage but no national measures were adopted.

There was some agitation for public war damage coverage prior to our entrance into the second World War. No action was taken until December 13, 1941, when the RFC, at the request of the President, established the War Insurance Corporation. No policies were issued and no premiums were charged or collected. Subsequently, in March, 1942, the RFC Act was amended to establish the War Damage Corporation as successor to the War Insurance Corporation. The War Damage Corporation was to provide protection for real or personal property and was established as a policy-writing and premium-collecting type of organization. Following the war, the War Damage Corporation was placed in liquidation and proceeded to wind up its affairs.

It might be pointed out that the destruction in the Philippines was covered by a separate law—the Philippines Rehabilitation Act. The Philippines Act was the most comprehensive war damage plan which we have ever had in this country and is quite a contrast to any proposed legislation for a War Damage Corporation. Under this Act about 1,300,000 claims were filed. The Commission expended $400,000,000 for private claims and approximately $55,000,000 for public property claims. This Act provided a gratuitous plan and no premiums were charged and no policies were issued.

The Korean incident served to revive interest in the subject of war damage. Several bills were introduced in the last Congress to re-establish the War Damage Corporation in essentially the same form that it existed in in World War II. These bills lay dormant for most of the legislative session and it was not until December 4, 1950, that action was taken. Hearings were held in both the House and Senate and the bill passed the House, but because the Senate was working on a very close schedule, the bill never came out on the floor and died with the end of the 81st Congress.

With that past history, I think it might be well to discuss certain aspects of the problem. A study of war damage indemnity has indicated certain basic principles which must be recognized in evaluating any scheme of war damage. At this point I would like to discuss certain features of the problem which are peculiar to property damage indemnity before going on to the personal injury phase. These are features which you gentlemen, as buyers of insurance and as persons having the responsibility for the protection of large values, should be vitally interested in.

Why A Government Plan?

The first question which naturally occurs to the uninitiated is, "Why do we have any governmental plan of War Damage Indemnity? Don't the private insurance companies provide it and if not, why not?" The answer, of course, as you well know, is that the standard property damage policies have war risk exclusion clauses eliminating war losses from the scope of the policy. This is done generally because the insurance industry has realized for a long time that it was not capable of coping with the possible catastrophic losses caused by war. It has neither the reserves nor the money-raising powers to ensure a solvent plan.

Who Pays For Losses?

One of the first problems raised is who should pay for the losses. In considering this we have the question of whether the

cost should be borne by the individual property owner through premium payments, by the Government through taxes, or by a combination of both. There are many points in favor of each approach and historically we find that various countries have disagreed.

It does seem that most property owners would be willing to pay a reasonable level of premiums, even though they couldn't afford to pay the total cost of widespread destruction. On the other hand, losses of this type should justly be considered as part of the expenses of war. As such, it is the duty of government to mitigate the effects of these haphazard blows. It then resolves itself into an economic question of whether the premiums paid would be of sufficient size to justify maintaining the machinery for their collection and recording.

It should be emphasized that what we are now contemplating is not necessarily an immediate war of two or three years' duration but an emergency period of possibly ten or twenty years. This, of course, complicates the picture considerably. Thus, for instance, at first blush it would appear logical to commence collecting premiums immediately in an effort to build up a large enough reserve to pay off probable catastrophic losses without recourse to the Federal Treasury. However, this poses a difficult problem of "investment" of reserves.

The premiums paid into the War Damage Corporation would undoubtedly go into the Federal Treasury and on paper would appear to the credit of the Corporation. This would create a situation similar to that existing with respect to Social Security reserves. In other words, there is a paper reserve of several billion dollars which is spent by the Government in current programs and when time comes to pay off, additional taxes must be raised to pay the obligation.

Advance Commitments

The next problem is whether it is necessary to make any advance commitments. The problem of advance commitments may be approached in one of three ways:

(1) Merely passing a law saying that the Government recognizes its responsibility and will indemnify the damaged party to some extent at some time after the injury;

(2) Passing a law setting up an indemnification plan on paper but going no further; or

(3) Setting up a pilot organization which will establish procedures, etc., to go into effect immediately if losses are incurred.

The first approach has been rejected by all countries which have considered the problem. Such an indefinite commitment creates a great deal of dissatisfaction and, further, owners of essential properties which are damaged have no initiative to rebuild without some firm assurance other than a post-dated check with the amount left blank.

The experience of these countries, as well as our own, demonstrated quite clearly that in order to keep the domestic economy functioning properly, there must be an advance commitment to indemnify the owner of property for war damage losses.

Causes of War Damage

The definition of causes of war damage involves the wording of the insuring clause of the war damage policy. The principal object, of course, is to be sure that the coverage granted shall be sufficient so that when meshed with the coverage afforded by the private insurance companies, it will provide the insured with complete but not overlapping protection.

One point which is causing some discussion at the present time is with regard to the type of exclusion to be used with respect to atomic weapons. One view is that all damage from atomic weapons should be excluded, regardless of whether it occurs in peace or war. The other view is that the exlusion should only apply to losses from atomic weapons in wartime, on the ground that the likelihood of accidental or peacetime damage is so small that it is not good public policy to exclude it from the contracts offered by private insurance companies. Furthermore, the protection should be available from some source, and if the private companies will not provide it, there is a possibility that the Government will.

Compulsory Coverage

The tendency in the United States and Canada has always been to use a voluntary plan, based in part, I believe, on our fundamental opposition to all forms of compulsion. Possibly we have been affected to a certain degree by the fact that we have suffered no widespread homefront losses.

Experience with the War Damage Corporation of 1942 and the Canadian experience, as well as common sense, indicates quite clearly that the only persons who will purchase protection under a voluntary plan are those who have reason to believe that they are in prime military target areas. This is an excellent example of "adverse selection." The arguments advanced in favor of compulsory coverage are:

(1) From strictly an insurance viewpoint, it is advisable to spread the risk uniformly and avoid adverse selection.

(2) With the advent of modern weapons, including methods for depollinization, germ warfare, etc., it is entirely possible that damage would be caused in areas whose inhabitants thought that they were relatively safe from the hazards of war.

I think it is readily apparent that if there are any great number of uninsured losses there will be considerable pressure on Congress to pay these claims after the war. This, of course, strikes at the very root of a voluntary policy-writing plan. If all losses were paid out of the tax-collected funds as was done in Germany and France, then the problem of non-coverage disappears.

As contrasted to the arguments for a compulsory plan, however, there is what appears to be the greater practical problem of operating a compulsory plan which seems to nullify the arguments for compulsion. The two practical barriers which we encounter are (1) collection of premium and (2) calculation of the premium (not the rate).

The compulsory collection of premiums runs into certain constitutional objections which, while difficult, are probably not impossible to overcome. However, the calculation of the premiums, which in turn depends on the valuation of the property, is practically insolvable. The heterogenous valuation procedures now in use cannot be resolved to a common basis and it would be virtually impossible to revalue the entire country on a common basis.

One method suggested is to put an excise tax on fire insurance premiums with war damage indemnity coverage equivalent to the amount of insurance carried and with auxiliary provisions for self-insured properties. On reflection, it will become apparent that this method is not fair. The application of the tax to the amount of insurance carried may be valid but certainly the application to the rate is not. The rate is based on the hazards of the risk, which have no necessary relationship to the war risk hazard. For example, we might have two identical buildings, each worth $1,000,000, but one occupied by a very hazardous occupancy and one by a relatively non-hazardous occupancy. The rate on the one might be 50c and the other $1. The fire premium for one would be $5,000 and for the other would be $10,000. Applying the excise tax to these premiums we see that one would pay twice the tax that the other would, although the two might be side by side and equally susceptible to war damage.

Personal Injuries

This is a field in which you, as employers, should be vitally interested, particularly with respect to workmen's compensation coverage. As you well know, workmen's compensation liability is a direct charge on the employer and in only a few states can he fully discharge this liability by insuring it. In all other states, if the insurance company or State Fund is unable to pay, the employer is still liable. Further, if you are self-insured, you do not even have the intervening protection of the assets of the insurance company. For that reason, you as employers have a large potential liability.

Here again you are entitled to ask why the Government must enter the picture and why the private companies cannot furnish the protection. I shall go into that in a moment but I would like to point out that the more fundamental question is how come you are liable at all. The answer to this is not easy and may be framed in a non-satisfying manner as follows: There is no absolute certainty that you are liable but you may be!

The difficulty stems from the fact that workmen's compensation laws were never written with the war risk hazard in mind. They are not geared to the complexities of modern warfare.

There is respectable legal opinion on both sides of the question as to whether injuries caused by bombing a r e compensable under existing workmen's compensation laws. Workmen's compensation authorities in some states have said flatly that such injuries are covered by their law. It is, of course, well known that these laws do not at the present time contain any war risk exclusion provisions and, further, a company, under these laws, could not place such an exclusion in its policy. Similarly, self-insurers and state funds are

in a like position under these same laws.

Some attempt has been made to distinguish between the liability which might be imposed by pinpoint bombing, area bombing, indiscriminate bombing, etc. The argument is that if the plant is the direct target, then the employee is being subjected to a hazard to which the general public is not exposed and his injuries would be compensable. On the other hand, in the case of area or indiscriminate bombing, he is exposed only to such hazards as are encountered by the general public and injuries would not be compensable. It is believed that such a distinction is academic because, in a given case, it would be impossible to determine which condition prevailed. Because of this difficulty of ascertaining intent, it would appear to be impossible to make compensation hinge on the question of intent.

This illustrates the complexity of the problem and indicates why the answer to the question must be the unsatisfactory one; that you are not definitely liable but you may be.

The program for indemnification of personal injuries in other countries followed somewhat the same pattern that the property damage program did. The German Act was passed on September 1, 1939, and the British Act on September 3, 1939. The German Act, from the beginning, extended benefits to all Germans who were injured as a result of military action. The original British Act, on the other hand, applied only to "persons gainfully employed" and "civilian defense volunteers." It was amended on April 10, 1941, to cover all civilians, the only criteria being that the injury must have occurred as a result of enemy action.

The approach with respect to workmen's compensation liability was different. The British law followed the course of relieving the employer from any liability to pay compensation under workmen's compensation laws and substituted therefor a schedule of benefits. The German law, on the other hand, provided that when a payment for personal injuries incurred under the workmen's compensation law had been made by an insurance company, the company would be reimbursed by the Government.

It will be noted that in both of these countries the approach was an over-all one with respect to personal injuries and workmen's compensation was brought in as one aspect of the entire problem. Some people in government are advocating the holding up of any legislation here until the entire problem can be surveyed and a comprehensive plan covering all aspects worked out. This approach overlooks the fundamental reasons for putting an immediate plan into operation; namely, the effect on civilian and business community morale and the necessity for setting up a going organization to record losses, etc. With respect to the personal injury side of this problem, so far in the United States the effort has been to treat workmen's compensation along with property damage and leave the broader picture of personal injuries to be dealt with at a later date.

The question has been asked as to why this is being done. I think that it can be best illustrated by the following points:

(1) Liability for workmen's compensation is a statutory liability from which the employer and his insurance carrier have no escape. We, therefore, have the picture of an inflexible liability imposed by State law.

(2) It must be recognized that a definite catastrophic possibility is presented in the case of workmen's compensation because normally the entire risk in a given plant will be carried by one company. It is entirely possible that the bombing of a given plant might produce sufficient injuries and deaths to wipe out the reserves and assets of the interested companies.

(3) The continued solvency of employers and insurance companies is of the utmost importance to the economy of the country and to the furtherance of the defense or war effort as the case may be.

For those reasons it seems apparent that property damage indemnity and reinsurance of workmen's compensation war risk losses by the Federal Government are of prime importance and should be treated first.

There are several solutions to this problem of workmen's compensation liability which may be briefly summarized as follows:

The ideal solution of the war risk problem from the standpoint of employers and their insurance companies would be an exclusion of liability in the workmen's compensation policy, similar to that existing in the property damage policies. There are two possible approaches to bring this about.

First, there could be an amendment to the various state laws excluding war risk as a covered hazard under workmen's com-

pensation laws. It seems to be the general impression that for several reasons this procedure would be difficult, if not impossible.

Second, would be the passage of a Federal law relieving an employer from losses under state workmen's compensation laws. The effect of this type of law is open to question on a constitutional basis. It also has other aspects which mitigate against it.

Whichever type of approach might be undertaken, it would appear politically impossible to attempt to divest any possible coverage at the state level without simultaneously granting coverage from another source, presumably the Federal Government, and possibly with adverse after-effects.

The only other apparent practical method, therefore, of covering losses and insuring solvency is to reinsure any possible war risk liability in an agency of the Federal Government. Such a procedure does not present any difficult constitutional problem but it does raise several corollary questions.

In summary, while it is admitted that workmen's compensation is but one item of the personal injury picture, it should not be required to be held in abeyance while consideration is being given to the innumerable factors which must be considered in connection with a broad personal injury program.

I don't mean to skip lightly over the other features of the personal injury picture but I believe that they are already partially taken care of through the Red Cross, Civilian Defense and other organizations currently being administered and these will all have to be integrated when and if the Government, as a matter of policy, decides to extend coverage to the entire civilian population.

Economic Injury

It will be recalled that when I first mentioned the subject of war damage indemnity, I broke it down into three phases—damage to property, damage to person, and economic injury. I would like to comment very briefly on the subject of economic injury. In a way this might be said to be somewhat akin to business interruption insurance, although it differs in many respects. Some people hold with the view that the economic consequences stemming from a loss of earnings, an inability to convert to war production or to rebuild damaged facilities are as much a part of the war cost as any other injury. Adoption of a program of this type conceivably could cost far more than all the other programs put together. In the final analysis, it seems that we can only make a distinction between the case where actual damage is done and the case where no physical damage is done, allowing compensation only to the former.

Feasibility

One of the questions which is inevitably raised in any discussion of war damage indemnity is the practical feasibility of any such plan. The feasibility of such a plan has been debated from 1935 down to the present day. It is my opinion that the discussion is not of material practical importance for several reasons.

First of all, I would like to point out that both the French and the British, who suffered losses of approximately $2,500,000,000 and $5,000,000,000 respectively in the past war, have already paid a majority of these losses, thus indicating that as long as a country is victorious in war it can afford an indemnity plan.

The second reason is that the establishment of a program is essential for civilian morale and to keep the economy properly functioning. The experiences of other countries, as well as our own, demonstrates this quite fully.

My third reason is that if widespread destruction does occur, Congress will get another look at the program to see what further course is feasible, due to the fact that the original billion or so of capital of the War Damage Corporation will be insufficient to cover a major catastrophe. Any program of indemnity for property damage will have to call for the adjustment of the losses immediately but will provide for the general deferral of reimbursement until after hostilities have ceased. Therefore, when Congress is called upon to supplement the original capital of the War Damage Corporation, it will probably do so at the end of hostilities and at that time will be able to fully assess the situation with all the facts before it and decide how much the economy can stand. In this respect, the obligations for war damage liability probably will be in no different position than Government bonds or other promises to pay on the part of the Government, all of which may require re-examination.

In this connection, it might be well to

point out that in the final analysis, the capitalization is relatively unimportant. The real purpose of such a corporation is to set up the machinery for writing policies, if any, establishing insurable interests, recording claims, adjusting losses or doing such other activities as may be required, depending upon the final outcome of how the indemnification program is to be undertaken.

The experience of all countries has shown conclusively that a dispassionate consideration of all the factors involved is of little value in weighing feasibility. Rather, it seems that once the public is sufficiently aroused, any question of feasibility is foreclosed and the only question left is that of method.

I know that by now the question in your mind is, "Well, this is all fine, but just where do we stand at the present? What is being done to alleviate the situation?" The answer is that we are marking time and possibly advancing a little. I gave you a brief resume of what happened in the 81st Congress.

In the 82nd Congress, seven bills have been introduced. Two of these bills cover property damage only; a third is extended to cover reinsurance of workmen's compensation and the other four bills are further extended to include reasonable compensation for civilian defense workers injured in course of duty. Several hearings have been held on the Senate bills by a Sub-Committee of the Senate Banking Committee. Many interested parties gave their opinions of the bills and these have been well reported in the press. Nothing further has developed as yet and with the war scare subsiding for the present, it is anyone's guess as to when and whether these bills will ever be fully considered. My own impression is that probably nothing will be done with them for some time unless the war situation takes a turn for the worse.

Therefore, the net result is that you are still unable to obtain coverage for your property against war damage losses and you are further unable to reinsure any possible liability which you might have for war risk losses incurred under a workmen's compensation law. The possibility is not one to be contemplated with equanimity but, on the other hand, in the absence of any more certain signs of war, it is not hopeless.

As contrasted to the policy-writing, premium-collecting method of procedure incorporated into the present bills on War Damage Indemnity, some people who have given considerable thought to this subject are advocating another philosophy, following somewhat the procedures used in Germany and France and the Philippines Rehabilitation Act. This, you recall, is an outright indemnity-type plan with no collection of premiums and no issuance of policies.

It has been suggested as an alternative to the policy-issuing plan that the Government set up a bookkeeping item of, say, $5,000,000,000 or $10,000,000,000 for a reactivated War Damage Corporation to draw upon, subject to such rules and regulations as the industry and the Government shall formulate. This Corporation would furnish coverage for all types of insurance, including fire, casualty, life, and accident and health. Under this plan, in case of loss the fire companies would simply certify, if the property is insured, an estimate of the value thereof as indicated by their own records. The compensation companies would set up their claims on the basis of the present coverages and then draw upon the Corporation for the war losses. Life insurance companies would turn over as an offset the cash surrender value of their policy at the time of the assured's death if it was caused by a war hazard. The fund would be reimbursed as frequently as may be necessary from funds raised by general taxation.

This plan has several things to recommend it and deserves close study. It admittedly presents certain problems which must be solved, but it would eliminate several of the problems inherent in the other plans. This is particularly so if the plan to be adopted has to operate for several years before losses are incurred. It should tend to reduce administrative expenses considerably inasmuch as it eliminates the handling of premium payments, the writing of policies, etc. It also eliminates charges of discrimination which might arise in two ways. First, it applies equally to all persons and all kinds of insurance. Secondly, it is obvious that in the case of a catastrophic loss, the premiums which might be collected would be relatively insignificant and a great majority of the losses will be paid directly out of the Federal Treasury. If the Government pays most or all of these benefits out of the Federal Treasury, it has been claimed that under a policy-writing plan there would be discrimination between those having pol-

icies and those not having policies. This arises by virtue of the fact that both types of persons will be contributing through taxes to the payment of these losses but only one type, *i.e.* the one purchasing a policy for a relatively nominal amount, will be indemnified. The outright indemnity-type plan would likewise meet this objection.

Conclusion

In the foregoing I have tried to indicate some of the questions and some of the problems which are inherent in this subject of war damage insurance. The purpose was not to give you a complete and exhaustive review of the entire subject but merely to bring out the high points, which I hope will serve to raise further questions in your mind. If I have accomplished that, then my mission has been served. If we can get people talking about a subject and thinking about its various aspects and discussing them with one another, I am sure that any of our problems, several of which are much more complex than war damage, can be satisfactorily resolved and this country can go forward to greater heights than it has ever attained in the past.

The Preparation and Defense of Owners, Landlords and Tenants Cases

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THE development and growth of general liability insurance to the point where it has become a major factor in the casualty insurance business are of recent origin.

Some of the companies I have been privileged to represent had been writing this type of insurance for many years. No one paid much attention to it. It was something that came with the general line of "full coverage." It was incidental. Some companies did not bother to investigate the claims. "Nuisance value" settlements were made wherever possible.

Other companies adopted a policy of denying all claims. Their loss ratio was so low that few could believe it would not level off in due course of time. They experimented. They paid off in cases where the doctrine of *res ipsa loquitur* applied and defended practically all other cases. The cost of defense, however, was out of all proportion to the amounts paid in actual loss. The figures did not look right. They experimented again, relaxing their rigid rule a bit to make "nuisance value" settlements in a certain percentage of cases. Litigation increased. The lesson had been learned.

In spite of this, most of the companies were too intent upon the then increasing volume of automobile business to pay heed to the potentialities of the broader field of general liability. It has only been within the last ten or twelve years that the companies' interests were attracted to this very lucrative type of business. Those with wider experience defended practically every case, and cost bills were promptly turned over to collection agencies. As the automobile loss ratio increased, the loss ratio in general liability decreased.

Five years ago, O. L. and T. claims could have been classified under ten or twelve headings. Today, such an index would have to be tripled. Although the fundamental principles are unchanged, there has been an increase in the scope and complexity of O. L. and T. claims to the point where the preparation and defense thereof is more and more becoming a specialty. The average lawyer does not have time to keep up with the increasing number of decisions touching upon the subject.

There is no trick involved. Each file should contain a complete investigation to support the theory upon which the case is to be defended. This means work. It requires close cooperation between the adjuster and the attorney. The latter should outline in a general way what he desires developed in the investigation. This can often best be accomplished in informal discussions as the various types of claims arise.

Let us take a case involving insufficiency of illumination.

It is the law of this State that a defend-

ant is under no duty to warn or give notice of a danger which might arise from causes or conditions which are readily apparent to the eye. The defendant is entitled to assume that the plaintiff will perceive and see that which would be obvious to him upon the ordinary use of his sense of sight. (*Shanley v. American Olive Co.*, 185 Cal. 552; 197 Pac. 793). Let us take that as an example.

If the danger was apparent, statements should be taken to establish this fact. There should be no direct attempt to elicit any such information from the claimant. In the first place, it would probably be to no avail; and in the second place, it might reveal the theory of defense. It is better to bring out in the statement where claimant contends he was looking immediately prior to the time when he fell. Generally, a claimant will say he was "looking straight ahead" or "in a normal manner." The claimant should not be permitted to stop there. Was he looking down immediately before he fell? If he says "yes," and the condition was apparent, there is no liability. If he does not recall where he was looking immediately before he fell, there would be no liability because a jury cannot infer from that that "he looked and could not see." If the claimant says it was "dark," another course should be pursued. An attempt should be made to develop a condition so dark that he couldn't see a thing. Generally, in such cases, he will say it was "pitch black," and he "had never been there before." Fine! Then you have the foundation for a sound argument on contributory negligence.

This is a simple illustration. To be more specific, let us consider a few of the more common types of claims.

Liability of an Abutting Owner or Occupant for Injuries Occurring on a Public Sidewalk

Condition Created by Owner or Occupant

If the abutting owner or occupant by positive action creates a condition which is likely to cause harm to persons lawfully using the public sidewalk, and a person is injured as a proximate result thereof, the owner or occupant who created the condition is liable. He is under a duty to refrain from doing any affirmative act that would render the sidewalk dangerous for public travel. (*Barton v. Capitol Market*, 57 C. A. 2d 516; 134 Pac. 2d 847).

Maintenance and Repairs

In the absence of statute, there is no common law duty resting upon the owner or occupant of premises abutting on a public street to keep the sidewalk in repair. Consequently, in the absence of statute, it is well settled that such an abutting owner or occupant is not liable to pedestrians injured as a result of defects in the sidewalk, which defects were not created by the owner or occupant. (*Bolles v. Hilton & Paley*, 119 C. A. 126; 6 Pac. 2d 335).

In 1935 a statute was passed, which provided in part: (Deering's General Laws, 1937, Act 8199).

> "It shall be the duty of the owner of lots fronting on any portion of a public street . . . to maintain any sidewalk . . . in such condition that the same shall not endanger persons or property and to maintain the same in a condition which will not interfere with the public convenience in the use of said works or areas. . . . When any portion of such sidewalk . . . shall be out of repair or pending reconstruction and in condition to interfere with the public convenience in the use of such sidewalk . . . it shall be the duty of the superintendent of streets to notify the owner or persons in possession of the property fronting on that portion of such sidewalk . . . so out of repair, to repair the same."

The section goes on to provide that the superintendent of streets shall prepare a notice to repair which will be mailed to the property owner and a copy thereof posted on the premises. If within three days after notice is given, the property owner does not make the required repairs, the superintendent shall do so and the property owner may be assessed for the cost of repairs.

It was contended (*Schaefer v. Lanahan*, 63 C. A. 2d 324; 146 Pac. 2d 929) that this statute not only imposes a duty upon the property owner to pay for repairs, but also creates a duty in favor of travelers on the sidewalk, and makes the property owner liable to such travelers for injuries received because of the defective condition of the sidewalk. This theory was rejected. Our courts have held that this section merely provides a method by which the city may collect the cost of repairs from the property owner. It creates a duty on the part of the property owner to keep the sidewalks in repair—but that duty is

owed to the city, not to the traveler on the sidewalk. The primary duty and responsibility to repair sidewalks remains with the municipality, and it cannot transfer that duty to property owners, nor relieve itself from responsibility.

There is no liability on a property owner in favor of third persons injured on the adjacent sidewalk, even if the owner, after being given notice to repair, fails to do so.

Sidewalk Elevators, etc.

Where a portion of a sidewalk is used for the particular benefit of the adjacent landowner, such as grates or glass therein for light, or sidewalk elevators, it has been held that the abutting landowner is liable for negligent construction, or maintenance which proximately causes personal injury to a pedestrian. (*Daly v. Mathews,* 49 C. A. 2d 545, 548; 122 Pac. 2d 81).

If there is a defect which falls within this category, the dimensions should be carefully checked. Under ordinary circumstances it will be found that any defect in the elevator would be due to the expansion or contraction of metals which is ordinarily bound to occur. (*Clarke v. Foster's, Inc.,* 51 C. A. 2d 411; 125 Pac. 2d 60). Other conditions may fall within the so-called rule of "trivial defects." As to such defects, there is no liability. (*Robson v. Union Pac. R. R. Co.,* 70 C. A. 2d 759; 161 Pac. 2d 821).

Terrazzo

In recent years an ornate composition known as terrazzo has become widely used in sidewalks abutting public buildings. When wet, terrazzo becomes slippery. We were afraid of it, and we settled a great many of these claims rather than take the chance of an adverse verdict which would encourage the filing of still more of these cases. Eventually a case was filed which could not be settled within reasonable limits, so we decided to face the issue. The first thing we did was to prevail upon opposing counsel to join the City as a defendant. We went to the City Attorney and said, in effect: "Brother, you gave us permission to install this sidewalk, now it is up to you to help see us through." The City was very unhappy. With the assistance of engineers and experts in marble, we learned that terrazzo generally consists of 15% cement, 65% chip marble, and 20% alundum. The cement and chip marble are mixed and spread, and the alundum is then sprinkled over the entire surface. Alundum is an abrasive that retains its friction resistance qualities for an indeterminate period. When the surface hardens it is polished by the application of carbarondum, which is a sort of stone. This process causes the composition to shine, but it does not affect the friction resistance of the alundum. Specifications governing the component parts have been prescribed by the City of Los Angeles.

Most of these claims arise at times when the terrazzo is wet with rain. Let us assume that your assured's negligence under those circumstances is a question of fact for the determination of a jury. After taking statements from any available witnesses, the adjuster should immediately contact the architect who drew the plans, and the contractor who performed the work. Ascertain the date when application was made for a building permit, then check with the office of the City Building Department or Department of Streets with respect to the permit. Plans and specifications are always submitted with the application for permit. Have your architect check the plans and specifications to ascertain if they conform with the provisions of the city ordinance. Locate the individual in the Building Department, or Department of Streets, who inspected the job to insure that it was constructed in conformity with plans and specifications. Generally, but not always, a certificate of completion is issued. When this investigation has been completed, the trial attorney is in a position to make a strong and convincing argument. He can point out to the jury that the assured is just a layman, with no more knowledge of construction than the average individual on that jury. Being a reasonably prudent man he went to a skilled architect who prepared the plans in strict accordance with the provisions laid down by the City; he employed a skilled contractor to perform the work, and the City placed its stamp of approval thereon by issuing a building permit. The completed work was inspected by an official of the City, found to be in accordance with good building practice, and, in effect, safe for the purpose for which it was intended. Can it be said that any reasonably prudent person would do more? Would any individual juror do more? Would any juror bring in a verdict against the defendant for doing that which the City said he could, and should do? (This would

also apply to approaches to buildings, even though not on public property). The argument appeals to the average juror.

Now let us assume this is a pure question of fact. Let us further assume the sidewalk, or approach to a public building, was constructed prior to the time when the City adopted its present specifications, and you are unable to locate the architect, the contractor, and the permit. An architect or engineer should be called to ascertain the grade. A piece of the composition should be chipped out and an analysis made. This would lay the foundation for hypothetical questions to develop that the work conformed to standard or approved engineering or building practice. The argument naturally follows that there can certainly be no negligence where one builds in accordance with standard building practice.

It is always well in cases of this type to ascertain the coefficient of friction at the place where claimant is alleged to have fallen. A comparison of terrazzo and smooth trowel finish cement sidewalks is rather surprising. If the terrazzo contains 20% alundum aggregate, there is little difference between the two when both are soaking wet. The value of this comparison becomes apparent when one stops to consider that until a few years ago approximately 50% of our city sidewalks were smooth trowel finish cement.

In empaneling a jury it is advisable to interrogate each juror on *voir dire* concerning any personal experience he may have had while walking over terrazzo. In one of the cases I tried some years ago, five of the prospective jurors admitted they had slipped, that they had formed an opinion that terrazzo was unsafe, and all were excused when challenged for cause. The effect upon the remainder of the panel was devastating; the result was a unanimous verdict for the plaintiff. A new trial was granted. The same questions were asked of the jury at the second trial. None had slipped. That trial resulted in a defense verdict. This is a dangerous line of questions, but I am of the opinion they should always be propounded in terrazzo cases.

These cases are not too dangerous. Better than nine out of ten can be won if they are properly prepared and presented. In my opinion the terrazzo itself is more dangerous than the cases.

Stores and Public Buildings

Aisles and Passageways

It is mandatory that aisles in stores be kept free and clear of all defects and obstructions. This is a salutary rule. Display windows and counters are so arranged as to attract the attention of prospective purchasers. The more attractive the display, the less likely the patron will pay heed to where he is going. The defense of contributory negligence seldom avails us anything in cases of this kind. They should be settled.

We are presently being confronted with cases wherein customers of stores have been injured by objects being knocked off of counters by other customers. Logical reasoning tells us that this may happen. The store operator should arrange his display in such a way as would minimize the danger. These cases should be settled.

It is not uncommon for patrons of stores and employees to collide with each other. Generally there follows a mutual apology and the incident ends. In cases that have proceded to trial the courts have held that each party must use ordinary care to avoid injuring the other. (*Brisbin v. Wise Co.*, 6 C. A. 2d 441; 44 Pac. 2d 622). I believe these cases should be defended.

Foreign Substance

One of the most common type of slipping case is that involving a so-called foreign substance on the floor. (It is not my intention to discuss the broad topic of Market Operators' Liability. To do so would unduly extend this lengthy dissertation. Whatever may be the law applicable thereto, no reference to accidents in markets is intended herein).

It has been definitely established in this State that the owner or operator of a public building is not responsible for accidents resulting from a foreign substance on the floor unless the plaintiff can prove, by a preponderance of the evidence, that the owner or operator (1) actually created the condition, or (2) that he had actual knowledge thereof, or (3) that the condition had existed for a sufficient period of time prior to the happening of the accident as would have charged him with constructive knowledge thereof and given him an opportunity to remedy the situation. (*Crawford v. Pacific States Savings & Loan*, 22 C. A. 2d 448, 71 Pac. 2d 333; *Matherne v. Los Feliz*

Theatre, 53 C. A. 2d 660; 128 Pac. 2d 59; *Owen v. Beauchamp*, 66 C. A. 2d 750, 152 P ac. 2d 756). It is practically impossible for a plaintiff to supply this proof. However, it is well to secure statements showing that frequent inspections were made, and no foreign substance was on the floor at the time of the last inspection. This is one of the easiest type of cases to defend.

Waxed Linoleum or Asphalt Tile

This, too, is a common type of case. Plaintiff slips on a waxed floor. She says it was extremely slippery, very shiny, there was an accumulation of wax, and her heel left a mark where it had "cut through" this excess accumulation of wax. Each case presents a question of fact for the determination of a jury. Each case requires preparation along a certain line. In alphabetical order the following should be done:

(a) Take a statement from someone who was present at the time, or who came upon the scene shortly thereafter.

(b) Ascertain when the floor was waxed for the last time immediately prior to the accident, by whom it was waxed, the particular wax that was used, the manner in which the floor was prepared for waxing, and the procedure used in applying the wax.

(c) Get a can of the identical make of wax and take it to an expert who will at once be able to tell you the component parts without the necessity of a chemical analysis.

(d) Arrange a meeting at the scene of the accident. Those in attendance should be the person who was present at the time of the accident, or shortly thereafter, the man who actually waxed the floor prior to the accident, the wax expert, and an architect or engineer with a machine to make friction tests.

(e) A friction test should be made of the floor in its present condition—which the eyewitness, or person who arrived shortly thereafter, will testify appeared to be the condition of the floor at the time of the accident. Have the person who actually waxed the floor prior to the accident prepare the floor as he did at that time. (This is usually done by using a solvent, or soap and water). After the floor has been permitted to dry, have another friction test made. Then have the floor waxed just as it was waxed prior to the accident. Another friction test should be made. If a buffer was used prior to the accident, the same procedure should be followed; and still another friction test should be made.

The results are amazing! In chronological order, this is what follows:

1. The floor, in its condition at the time when the first friction test is made, shows less friction resistance than under any subsequent test.

2. The floor, without the application of any wax, shows greater friction resistance.

3. After the wax has been applied, the friction test will reveal that it is *less* slippery than it was under the two previous conditions.

4. The act of buffing such a waxed floor has no effect whatsoever upon its friction resistance.

I could not believe this to be a fact. It had to be proved to me by experts. Here, in somewhat reverse order is what happens. When wax of this type is applied to linoleum, or asphalt tile, it, like water, seeks its own level. It forms a thin coating over the surface of the floor. Because of a non-skid substance in the wax the coefficient of friction is increased. The act of buffing merely insures a smooth surface, and brings out the sheen. It does not remove the non-skid substance which is an intricate part of the emulsion. Upon this smooth surface, dry though it may be, dry substances are brought in on shoes and particles of dust settle. These substances have a tendency to "roll" under one's feet. Thus the friction resistance is lessened. Under similar circumstances, an unwaxed hardwood floor has even less friction resistance.

The average plaintiff makes the situation even easier to defend. She will probably testify there were "ridges" in the wax, and that the mark on the floor was where her heel had cut through this accumulation of wax. This is entirely illogical. The wax has the consistency of water. The film formed thereby is too thin to be measured. It cannot form a ridge. If there is a depression in the floor, any accumulation therein is *sticky*. The heel mark is created by friction between the floor and the heel. It is similar to a skid mark that follows the application of automobile brakes.

The lawyer's approach to the jury in cases of this type is of importance. Each juror should be asked, on *voir dire*, whether she has linoleum or asphalt tile in her home. Practically every kitchen has such a floor. She should then be asked if

she occasionally waxes it with something like "Johnson's Glo-Coat." (I mention this particular wax because it is so widely known because of the "Fibber McGee and Molly" radio program). Most jurors will agree that they do use some sort of water wax at times, and, on occasions when the spirit moves them, they polish it. The next questions are: "It shines, and makes the floor look very pretty, doesn't it?" "And you still use it from time to time, don't you?" The answers are always in the affirmative.

The stage is set. We prove that "Johnson's Glo-Coat" is very similar to the wax we used. Every juror does the same thing we did. "The standard of ordinary care is that degree of care exercised by reasonably prudent persons under the same, or similar, circumstances." Jurors are "reasonably prudent persons." "You do it. We do it. Where is there any negligence?" It is a most convincing argument.

These observations do not apply where wax has been placed upon concrete or painted surfaces.

Elevators

The most common type of elevator accident is that resulting from doors closing on a patron. In spite of the fact that the operator of an elevator is required to exercise the highest degree of care, a prompt and intelligent investigation should minimize the danger in this type of case. The doors on most modern elevators are operated by air; the opening or closing of these doors cannot be accelerated manually. Elevators in public buildings are regularly inspected by some expert, and reports as to the condition are made to a department of the city. These are matters of record. In larger buildings the elevators are generally inspected daily by the building engineer. There is an air pressure regulator at the top or bottom of each shaft; this prevents any excessive pressure from being applied to the doors. There is an approved, or standard, pressure. This is seldom sufficient to cause serious injury unless directed at some particularly vulnerable spot. Generally, the doors can be stopped by the operator restraining one of them with his hand.

The first step in your investigation should be to check the records of the city pertaining to the last report on the particular elevator, and obtain the name of the person who made the report. Ascertain from your assured whether any subsequent inspection was made. Interview these men at once. Was the mechanism in good order? What was the pressure per square foot at approximately the point where the door contacted the injured person? You will find the pressure decreases as the doors come closer together.

Another type of elevator case is where the plaintiff claims the elevator started while she was entering or leaving. Elevators in public buildings are not all self-leveling. But there is an ordinance in practically every city that provides elevators shall be so equipped that they cannot be in motion while the doors are open. There is a mechanical device that automatically shuts off the power when the doors are open. Your investigation of this type of accident should be along the same lines I have indicated above.

Generally speaking, injuries from accidents of this type presently under discussion are not of a serious nature. But for some reason or other claimants are more particularly inclined to build up those injuries. We have met this with success by having the building engineer, in the presence of the jury, permit the doors to close on his person, just as it was claimed happened to the plaintiff. Where there is an attempted build-up on injuries, the facts which I have suggested be developed will often cast a shadow of doubt upon the bona fides of plaintiff's entire case.

Doors

There are two types of claims arising from the operation of doors, *i.e.*, revolving doors, and swinging doors. The doctrine of *res ipsa loquitur* does not apply. (*Olson v. Whitthorne & Swan,* 203 Cal. 206; 263 Pac. 518). Therefore, in the absence of a defective condition, there is no liability. There is no obligation to maintain an attendant to regulate the doors, or the conduct of those who make use of them.

The mechanism of a swinging door should be checked to ascertain that it was in good condition at the time of the accident. Even though the mechanism is faulty in that the speed of the swinging door is not decreased to the desired extent, individuals take such a distinct part in the operation of the doors that they are chargeable with the exercise of care commensurate with common knowledge. These are not dangerous cases.

Defective or Dangerous Construction

The most common type of accident involving alleged dangerous or defective construction occurs at the approach to a building where a pitch exists, or on stairways, or at a change in floor level.

As I have previously observed, applications for permits to erect buildings must be accompanied by detailed plans and specifications. These plans and specifications are checked by the City Building Department to ascertain whether they conform to the provisions of the applicable building code. If they conform, a permit is issued. During the progress of the work it is the duty of an employee, or employees of the Building Department to make periodical inspections to ascertain whether the building is actually being constructed according to the approved plans and specifications. When the building is turned over to the owner, a Certificate of Completion is generally issued by the Building Department.

The approach to public buildings. the stairway therein, and changes in floor level, are details that are always shown on the plans and specifications.

I have for years successfully defended cases of this type by producing the following:

a. The architect, to identify the plans and specifications, and to testify that they conformed to standard, or approved, architectural practice.

b. The application for building permit, with the accompanying plans and specifications, and the permit itself.

c. The inspector from the Building Department to testify that he made frequent inspections and found that the building had been constructed in accordance with the plans and specifications.

This is generally sufficient to establish that the defendant had exercised reasonable care.

Cases will arise wherein certain portions of a structure do not conform to existing building ordinances. You should immediately ascertain when the particular ordinance was passed, and the date when the building was constructed. Except for fire escapes and fire prevention measures, these ordinances are never retroactive.

Defective Condition of Carpet on Stairs

Numerous accidents result from carpets, or rugs, that are curled up, and protruding nosings on steps. In the absence of actual, or constructive knowledge of such defect, there is no liability. (*Gibbons v. Harris Amusement Co.*, 167 Atl. 250; *Downing v. Jordan Marsh Co.*, 125 N. E. 207; *Tolland v. Paine Furniture Co.*, 56 N. E. 608; *Hunker v. Warner Bros. Theatres, Inc.*, 177 S. E. 629).

Comment

It is obvious that I have not covered all types of accidents in buildings. The subject is too exhaustive to be included, in its entirety, herein.

Apartment Houses

Approach, Lobbies and Vestibules

A landlord is responsible for portions of the building used in common by several different tenants. His responsibility with respect to the approach, lobbies and vestibules would be the same as that of the owner or operator of a store or public building. (*Finch v. Willmott*, 107 C. A. 662; 290 Pac. 660; *Dorfer v. Delucchi*, 61 C. A. 2d 63; 141 Pac. 2d 905).

Defective Condition and Faulty Construction (Unfurnished)

In the absence of fraud, concealment, or covenant in the least, a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises. (*Shotwell v. Bloom*, 60 C. A. 2d 303; 140 Pac. 2d 728). This is the rule at common law, and it has not been changed by statute in this state. The doctrine of *caveat emptor* applies. After-acquired knowledge of pre-existing defects will not suffice to make the landlord liable, nor is it sufficient to show that by the exercise of reasonable care the landlord could have discovered the defective condition, but in order to hold him liable it must appear that he actually knew of such defect. (*Ayres v. Wright*, 103 C. A. 610, 284 Pac. 1077; *Turner v. Lischner*, 52 C. A. 2d 273).

At common law it was not in the power of the tenant to make repairs at the expense of the landlord unless there was a special agreement to this effect. Under Section 1942 of the Civil Code, the obligation of the landlord is limited by the extent of the privilege conferred upon the tenant; that is, it is the duty of the landlord to repair upon notice. If the landlord does not perform this duty, he is to be compelled to pay, by deduction from the rent to the extent of one month's ren-

tal or, in other words, the tenant may repair the same himself, where the cost of such repairs does not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent. Even though the landlord is notified of the defective condition, he is not liable even if he fails to make the repairs. (*Dorswitt v. Wilson,* 51 C. A. 2d 623; 125 Pac. 2d 626).

An interesting example is the case of the breaking of a porcelain handle on a water faucet. This is a comparatively common occurrence. The injuries are generally of a most serious nature.

The facts follow a certain pattern. Apartment houses, except of recent construction, were equipped with plumbing fixtures which included porcelain handles on faucets. Through the years a porcelain handle broke now and then. The broken ones were replaced with metal handles, the unbroken original porcelain handles continued in use. The faucets leaked from time to time, complaints were made, and repairs corrected the situation. The cases fall into two classifications:

First. The faucet leaks. The tenant, while attempting to correct the situation by turning the handle, notices there is a crack therein. She complains to the landlord, who promises to make repairs. He fails to do so. She continues to occupy the premises and, while attempting to shut off the water, the handle breaks. The defect was patent. She had an effective remedy under Section 1942 of the Civil Code to either repair the defect and deduct the cost thereof from the rent, or to vacate the premises. By remaining on the premises, she, as a matter of law, voluntarily assumed the risks to be anticipated from a known dangerous condition of the premises. (*Zavalney v. Donovan,* 70 C. A. 2d 182, 160 Pac. 2d 558; *Colburn v. Shuravlev,* 24 C. A. 2d 298, 74 Pac. 2d 1060).

Second. The faucet leaks. There is no visible evidence of a defect in the handle. On other occasions repairs had been made to stop the leak of the faucet, but they were unsuccessful. While attempting to shut off the water the handle broke, causing serious injuries to the tenant. In a recent case, (*Daulton v. Williams,* 81 C. A. 2d 70, 183 Pac. 2d 325), the Court held it was common knowledge that there is no relation between a leaking faucet and its handle; that the leak results from a worn washer. It was also held to be common knowledge that some porcelain handles on faucets are without defects after twenty-five or thirty years, although others fail in less time. The court held that even though the landlord had failed in a promise to make repairs, this would constitute mere non-feasance for which he is not liable. Misfeasance results only in making them negligently. In the instant case, the landlord was under no duty to inspect with the object of locating latent defects or of repairing them.

You have nothing to fear from cases of this type. This also applies to the fall of a ceiling in that portion of the building used exclusively by the tenant. (*Dorswitt v. Wilson,* supra).

Defective Condition (Furnished)

In the renting of a furnished apartment, there is an implied warranty that the furniture is fit for use or occupation. (*Fisher v. Pennington,* 116 C. A. 248; 2 Pac. 2d 518). This is founded upon a statute (Section 1955, Civil Code) which provides:

> "One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use."

This implied warranty has been applied in a variety of cases in this State. The most common type involves folding beds. Generally speaking, these cases have dealt with accidents happening within a comparatively short time after the commencement of the tenancy. In such cases, the jury might readily have concluded that the defect existed at the commencement of the tenancy and thus constituted a breach of the implied warranty. On the other hand, it is the law that a landlord is not an insurer of the safety of the premises or its equipment. (*Adams v. Dow Hotel,* 25 C. A. 2d 51; 76 Pac. 2d 210). This raises an interesting question. If a landlord is to be charged with an implied warranty as to the furniture he supplies and yet is not to be considered an insurer, then, surely, there should be some time limit beyond which the warranty would not extend. Is such limit a year, five years, or does it run to and include liability when the one-horse shay finally falls apart? If the warranty extends forever, would not the landlord become an insurer?

In recent years, I have defended several cases of this sort. Plaintiffs in each case occupied furnished apartments, on a month to month tenancy, for several months prior to the collapse of the bed. There were no patent defects. We were charged with breach of an implied warranty. After considerable research, I was able to convince the trial courts:

1. That the landlord is not liable for patent defects. (*Swyng v. Caylor,* 7 C. A. 2d 627; 46 Pac. 2d 979).

2. That the landlord is not liable for latent defects which could not have been discovered by the exercise of ordinary care. (*Zuvalney v. Donovan,* supra; *Daulton v. Williams,* supra).

3. The doctrine of implied warranty applies only to the condition of the premises at the commencement of the tenancy, and does not cover defects subsequently arising. (36 C. J. 48; 32 Am. Jur. 518).

4. While the tenancy was from month to month, it does not follow that each month of occupancy created a new demise. Such a tenancy is not a reletting at the beginning of each occurring month. (*Burroughs v. Ben's Auto Park, Inc.,* 27 Cal. 2d 449; 164 Pac. 2d 897).

5. Where the duty of making repairs is placed upon the landlord by statute, it is generally held that the landlord is not in default until he has been notified of the need of repairs by the tenant. (32 Am. Jur. 525).

6. It is the duty of a landlord not only to furnish an article free from defect when delivered, but also to inspect and repair it whenever called upon to do so during the term of the hiring; but in the absence of notice the landlord is not liable for injuries caused by defects arising subsequent to the delivery of the property to the tenant, unless he has expressly undertaken the duty of inspecting and repairing the property. (6 C. J. 1117). With the benefit of intelligent investigation, and under appropriate instructions, we were able to secure defense verdicts.

The investigation of these cases is worthy of mention. It is unlike the pattern followed in the investigation of any other case. The first step should be to ascertain the make of the bed. An expert, familiar with the particular make of bed, should be taken to the scene of the accident to ascertain the cause. Generally, the screws pull out, or the screws or bolts shear off.

If the screws pull out, an inspection should be made of the wood with a view toward developing the theory of latent defect.

If the screws or bolts shear off, it is likely that this was due to the exertion of abnormal pressure over a period of time. These beds fit snugly into the aperture into which they eventually disappear. They are generally bolted to the floor and ceiling, and revolve on these bolts. If the bedding is not tightly tucked under the mattress and firmly held by the iron clamps at the foot of the bed, and if the mattress is not in exact position, the bed has to be forced into its aperture. This force creates a bind upon the screws and bolts, which will eventually cause the bed to break loose. By establishing these facts, you will have laid an adequate foundation for a hypothetical question of inestimable value. The issue of contributory negligence has, by inference, been thrown into the very teeth of the jury. Every woman will admit to herself that at some time or other she has been careless in the making of beds.

The steps outlined in the preceding paragraph are merely preliminary. The average claimant will generally deny that she ever failed to tightly tuck under the mattress or force the bed into its aperture.

She should then be asked how long she had occupied the apartment. Was the bed used daily? Had she at any time prior to the accident noticed anything unusual about its operation? If the answer to the last question is in the affirmative, the exact nature of the "unusual operation" should be developed. The purpose of this is to establish the existence of a patent defect. You are then armed with a two-fold defense, *i.e.,* there can be no recovery for injuries from defects that are patent; and, by remaining on the premises the tenant voluntarily assumes the risks to be anticipated from a known dangerous condition. (*Zuvalney v. Donovan,* supra; *Colburn v. Shuravlev,* supra).

A claimant will generally deny any such knowledge. This will bring the claim squarely within a recent ruling of our District Court of Appeal.

In *Forrester v. Hoover Hotel,* 87 C. A. 2d 226, plaintiff had occupied a certain apartment for several months. It was equipped with a folding bed with the head thereof attached to the door of a closet, the door being pivoted at its top by fittings and a prong or pin in the door and door frame, and pivoted at the bottom by

a fixed pivot attached to the bottom of the door and resting in a socket set in the floor. The foot end of the bed could be raised and the bed thus folded up against the door, and while in that position the door could be revolved to move the bed into or out of the closet. This is the usual type.

The accident involved the upper pivoting device. This consisted of a metal plate fastened to the top of the door, with an attached upright prong or pin. Another metal plate was inset flush with the top door frame and fastened thereto with three screws. This plate contained a hole into which the upright prong or pin of the door attachment fitted loosely so that it could turn easily. When plaintiff's wife attempted to lower the bed the upper metal plate (attached to the door frame) and the three screws were pulled from the door frame, causing the bed and door to fall. There was expert testimony to the effect that the bed was not installed in the "approved" manner, in that the screws holding the plate were inadequate. There was no evidence that the landlord, who purchased the building some years prior thereto, had any knowledge of the alleged defect.

In reversing a judgment for plaintiff the Court said the judgment cannot stand unless it can be upheld on the theory of warranty, although there be no showing of knowledge and concealment on the part of the landlord. The court held that such liability as attaches to a landlord upon an implied warranty that where a completely furnished apartment and its appointments are suitable for occupancy in their condition at the time is confined to the condition of the premises at the beginning of the term and does not extend to conditions which, unknown to the landlord, subsequently arise; and where a tenant occupied an apartment for several months without discovering any defect in a wall bed which she uses, the landlord is not liable for injuries resulting therefrom.

Miscellaneous

It must be obvious to you that I have but lightly touched upon the subjects under discussion. I have made no mention of the following: Assault by Employees; Attractive Nuisance; Carbon Monoxide Cases; Contractors' Liability; Dog Bites; Explosion of Bottled Beverages; Falling Objects; Factual Situations Distinguishing Invitees and Licensees; Food Products Liability; Hotels' and Innkeepers' Liability; Insufficient Lighting; Manufacturers', Vendors' and Dealers' Liability; Markets; Non-Delegable Duties; Schools and Playgrounds; Skating Rinks; Theatres and Places of Public Amusement; Tools and Appliances; Water, and Rain, and many others.

General Observations

I have consistently taken the position that at least eighty percent of O. L. and T. cases tried should result in defense verdicts. It is a fascinating specialty. It deals with the activities of human beings, not mechanical objects. The accident is something any layman can visualize. Everyone has fallen at some time in his life. It is within the knowledge of each individual that falls are frequently caused by inattention or some other form of carelessness. And there are times when the cause of the fall cannot be determined. For this reason much can be accomplished by the experienced trial lawyer in his examination of prospective jurors on *voir dire*. The issue of contributory negligence, if injected into the minds of the jury on *voir dire* examination, is good insurance to offset the sympathetic picture created by a plaintiff in a wheelchair, or to plant a doubt in the minds of the jury at the outset.

These cases are won by the manner in which they are prepared. The evidence should be presented in simple, chronological order, and in a way that will appeal to the common man. In no other type of case can "the application of the yardstick of logic" be so effectively employed.

"Excess Liability"

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NO ONE can say with any degree of accuracy that within the periphery of a casualty insurance contract, the liability is clearly contained and definitely delineated. A common misnomer is the reference to such a policy as one which has limits of $5,000, $10,000 or $20,000, as the case may be. The smaller the policy; the less the premium; the greater the hazard of excess potential.

Some conception of the exposure may be readily comprehended from the printed provisions of the standard form. The automobile owner obtains from his broker a policy which expressly states that the insurer will pay an amount not to exceed $5,000 for a death or injury to one individual. He has an accident and reports it promptly. The notice is misplaced by the insurer, in a maze of voluminous files; or the summons and complaint, forwarded in due time to the offices of the insurer, are inadvertently forgotten or negligently ignored. The injured claimant secures a judgment against the insured for $25,000. It is patent that the insurer may thereupon become obligated to pay five times the face amount of the policy.

Certain insuring agreements have been in vogue for a long time. Among them is the covenant to "defend any suit against the insured alleging . . . injury, sickness, disease or destruction, even if such suit is groundless, false or fraudulent." Obviously, if the insurer fails to defend, it may become liable for the consequential damages, and policy limits are neither ceiling nor cover.

No iron-clad, gilt-edged, stone-wall defense is contemplated. Notwithstanding the best of investigation and preparation, and despite learned, aggressive and compelling advocacy, the administration of justice in trial and appellate courts through human agencies, carries with it concomitant uncertainty in all phases of litigation. The agreement to defend does not necessarily mean to defend successfully. Indeed, if all insurers were so fortunate as to have all hits and runs, and no errors, the subject of excess liability would be quite academic.

However, the defense must be adequate. There should be proper perspective as to the ultimate issue of liability and an appreciative, if not profound and expert, evaluation of the injuries measured for settlement consideration and in anticipating the range of verdict possibilities.

Hand in hand with the inflationary spiral and the generally accepted doctrine that it is more blessed to give than to receive, is the universal trend toward more generous and more frequent plaintiff's recoveries in negligence actions. This has been recognized by all insurers in the past decade. Since a broken leg, or a fractured arm, or the loss of an eye, or a post-concussion syndrome is worth far more in today's economy, the coverage of a $5,000 or $10,000 policy hardly reaches the blue expanse, where only the sky is the limit in the realm of five figure or six figure verdicts. That imposes on the insurer a greater likelihood that a bill for repayment of the excess may eventually be presented by the insured.

Excess liability does not mean excessive liability, but the more excessive the verdict, the more likely that the insured may complain of the conduct of his insurer and demand recoupment for the overplus. The more expansive the verdict, the more expensive to the insurer, unless the insurer comes four-square within the authorities who are marking the guide posts and outlining the paths, in order that the pitfalls leading to excess liability may be avoided.

In most standard policies is the provision that "the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient." If the company fails to make any investigation, or if the company negligently conducts the investigation, it may be assuming liability for the payment of judgment in excess of coverage.

While the insurance contract is a valuable document, designed to protect the insured, in consideration of his payment of the premium, it nevertheless imposes certain restrictions upon the insured. He surrenders the right to select counsel of his own choosing to defend him. He cannot personally, or through his personal attorney, negotiate a settlement, except at his own expense, and, if in so doing, he concedes liability or makes any statement that

may be so construed, he may be violating the provision that "the insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others, as shall be imperative at the time of the accident."

These and other conditions precedent are imposed upon the insured in current standard policies.

"The Courts have no power to add or subtract anything from the contract actually made, but must interpret it to carry out the intention of the parties." *Wisconsin Zinc Co. v. Fidelity and Deposit Company of Maryland*, 1916, 162 Wis. 39, 155 N. W. 1081.

In interpreting the insurance contract, there are statutory enactments and appellate authorities which may include the *lex loci contractus, lex loci actus* and the *lex fori.*

Although the prime parties to the contract are the insured and the insurer, the injured claimant and the reinsurer may be equally interested in the excess recovery.

Rationalizing Recent Trends

If the breach be flagrant or palpable, the redress might be readily anticipated. Contrariwise, the instances significant of the current pragmatism have been cases where the insurer has acted rather promptly and quite efficiently. Experienced investigators have conducted the essential investigation; and able counsel have been retained for the trials. Recommendations have been carefully considered and usually, though not invariably, followed. The interests of insurer and insured are concurrent, consonant and coincidental. The relationship has been termed a fiduciary one, with the insurer taking the position that the rights of the insured are neither paramount nor subservient to its own. An insurer cannot overlook the stake which it has in the claim and the attendant litigation; nor can it be recalcitrant in its concern for the insured who may be holding the greater bag, and who is completely dependent upon his insurer.

A light load is easier to carry. The insurer with a minimal policy can approach the most serious claim with assurance and confidence, in the hope that the four corners of the contract provide that the worst cannot be too bad. That complacency, with its inevitable decision to ride out the storm, may mean that the chips of the insured are down. Then there may arise the conflict of inimical and vicarious divergencies between the insurer and insured. The fertile ground of a claim with large potential, and a policy of limited coverage, frequently results in such harvest.

It has been said that the question is simply: "To settle or not to settle." True, most of the cases arise when an insurer has had the opportunity to settle within the limits of the policy, but has declined to do so. The right to settle is vested in the insurer, but there is no obligation upon his part to do so. The Court has never gone so far as to declare that the failure to settle within the policy *ipso facto* creates liability in the event of an adverse verdict above the policy coverage. But there is innate and inherent in the determination of the problem of settlement, the quotient for subsequent demarcation as to the *bona fides* of the insurer in exposing the insured to loss.

There is now pending in the Supreme Court of the County of New York, an action against an insurer predicated upon these circumstances: An insured with a $10,000 policy was sued for damages for the death of a man in his thirties. The insured gave conflicting statements as to how the accident happened, and forwarded two contradictory reports to the Motor Vehicle Bureau. Upon the trial, there seemed to be grave question as to the freedom of the decedent from contributory negligence. A conference was held with the insured, his personal attorney, the trial counsel and representatives of the insurer, at which time it was decided to rest at the end of the plaintiff's case and to interpose no defense. The verdict was in the sum of $33,000 and the insured paid the sum over the policy limits. He is now suing the insurer to recoup the excess payment, alleging that no witnesses were produced in his defense; that he did not take the witness stand to testify, and in effect, he is proceeding against the insurer, on a two-pronged complaint, founding in allegations of *mala fides* and negligence.

Let us begin with this premise, general-

ly accepted and recognized in every jurisdiction throughout the country:

Liability insurers have the same rights as individuals to limit their liability, and to impose whatever conditions they please in their obligations provided they are not in contravension of statutory inhibitions or public policy. *Hill v. Standard Mutual Casualty Co.*, C. C. A. Ill., 1940, 110 Fed. 2d 1001.

In the absence of some statutory provision to the contrary, an insurance company has a right to limit its liability and to impose restrictions and conditions upon its contractual obligation, not inconsistent with public policy. *Isaacson Iron Works v. Ocean Accident and Guarantee Corp.*, 1937, 70 Pac. 2d 1026, 191 Wash. 221; *Brustein v. New Amsterdam Casualty Co.*, 1931, 174 N. E. 304, 255 N. Y. 137, reversing 230 App. Div. 716 which affirmed 135 Misc. 352.

Even the insured's failure to read an insurance policy when it was received by him, has been held to be no bar to his seeking reformation even after the loss has been sustained. *Davis v. Highway Motor Underwriters*, 1931, 235 N. W. 325, 120 Neb. 734.

In cases involving accidents brought to recoup the payment of amounts in excess of policy limits, there is invariably no misunderstanding between the insured and the insurer as to the provisions of the contract. However, the conduct of the insurer in derogation of, or in violation of, or in disregard of its obligation to the insured is categorically projected into judicial purview, when actions resulting from excess judgments ensue.

The obligation which the insurer assumes to defend, has been interpreted as not requiring a successful defense but the insurer must contest the dispute to final judgment. *Utilities Insurance Co. v. Montgomery*, 1940, 138 S. W. 2d 1062, 134 Tex. 640 reversing 117 S. W. 2d 486.

Of course, an insurer is not required to defend a suit if it chooses to let a judgment be secured by default and then pay such judgment. *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 1899, 43 Atl. 503, 92 Me. 574. The primary responsibility of the insurer is to pay the insured's legal liability for specific contingencies, and the duty to defend suits is dependent upon and designed to supplement that primary obligation. *Putnam v. Employer's Liability Assurance Corp.*, 1939, 4 Atl. 2d 353, 90 N. H. 74.

Whether an insurer is required to defend depends not upon the details of the accident but upon the nature of the claim against the assured. This should properly be determined when the action is brought and not by the outcome thereof. *West Philadelphia Stockyard Co. v. Maryland Casualty Co.*, 1931, 100 Pa. Sup. 459; *London Guarantee and Accident Co. v. Shafer*, D. C. Ohio 1940, 1941, 32 Fed. 905, 35 Fed. 647.

If an insurer acts in good faith, it has the right to settle claims not in the process of litigation even though the payments in settlement shall exhaust the policy limits. *Bartlett v. Travelers' Ins. Co.*, 1933, 167 Atl. 180, 117 Conn. 147; *Bruyett v. Sandini*, 1935, 197 N. E. 29, 291 Mass. 373.

In most States there is no apportionment of an insurance fund and the principle "first come, first served" prevails. That applies both to claim and to judgments. *Turk v. Goldberg*, 1920, 109 Atl. 732, 91 N. J. Eq. 283; *Bleimeyer v. Public Service Mutual Casualty Insurance Corp.*, 1929, 165 N. E. 286, 250 N. Y. 264; *Frank v. Hartford Accident & Indemnity Co.*, 136 Misc. 186, affirmed 231 App. Div. (N. Y.) 707.

The courts have consistently held that an insured has a right to settle his liability for an excess recovery, without the consent of the insurer and without consulting the insurer, provided such settlement does not impair, impede or otherwise affect the insurer's defense within the policy limits. There is a divergence of authority when an insured contributes to a settlement that is within the policy coverage. Where an insured paid part of a settlement which did not exceed the face of the policy in order to avoid a manslaughter prosecution, he could not subsequently demand repayment from the insurer. *Cherry v. Shelby Mutual Plate Glass & Casualty Co.*, 1939, 4 S. E. 2d 123, 191 S. C. 177.

Some jurisdictions have held that where an insured contributes toward a settlement within the policy limit he cannot subsequently recover from the insurer upon the theory that by the contribution by the insured he may have escaped a contingent liability for an excess payment. *St. Joseph Transfer & Storage Co. v. Employers' Indemnity Corp.*, 1930, 23 S. W. 2d 215, 224 Mo. App. 221; *Levin v. New England Casualty Co.*, 1917, 101 N. Y. Misc. 402, affirmed 187 N. Y. App. Div. 935. But the overwhelming authority is *contra*, holding that where an insurer demands, requests or permits an insured to contribute to-

ward a settlement within the policy limits, the insurer may be charged with bad faith and the insured may thereafter recover the amount he has contributed; or in the event the insured declines to contribute he may thereafter obtain from the insurer redress to the extent of repayment of the excess. *Brown & McCabe, Stevedores, Inc., v. London Guarantee and Accident Co.*, 1915, 232 Fed. 298, *Maryland Casualty Co. v. Cook-O'Brien Construction Co.*, 1934, 69 Fed. 2d 462, certiorari denied 293 U. S. 569; *Mendota Electric Co. v. New York Ind. Co.*, 1926, 211 N. W. 317, 169 Minn. 377; *Carthage Stone Co. v. Travelers' Ins. Co.*, 1918, 203 S. W. 822, 274 Mo. 537, reversing 172 S. W. 458, 186 Mo. App. 318; *Boling v. New Amsterdam Casualty Co.*, 1935, 46 P. 2d 916, 173 Okla. 160; *Johnson v. Hardware Mutual Casualty Co.*, 1938, 1 A. 2d 817, 109 Vt. 481; *Lanferman v. Maryland Casualty Co. of Baltimore*, 1936, 267 N. W. 300, 222 Wis. 406.

The Bad Faith Rule Contrasted With The Negligence Rule

It is a moot question as to whether more authorities favor what has been termed "the bad faith rule" as distinguished from "the negligence rule." Appleman has noted that the bad faith rule is tending to become the minority rule being displaced by the rule of negligence. 8 *Appleman* 76.

In a recent analysis of the existing law in California, the United States District Court on April 4, 1950 had under advisement a complaint by an insured against an insurer alleging two causes of action, one predicated upon the insurer's bad faith and the other upon its negligence for failure to settle within the policy limits and to recover reasonable attorney's fees. Among other *dicta* in *Christian v. Preferred Acc. Ins. Co.*, U. S. D. C. Cal. N. D., 89 Fed. Supp. 888, is the following:

"Some of the cases hold that the insured is entitled to recover upon proof that the insurer in refusing to settle a claim for damages was guilty of negligence. Insofar as any standard of due care may be applied to the exercise of an honest judgment in accepting or refusing an offer of compromise, the test is rejected in the better reasoned cases, and we think rightly so. The practical difficulties in applying such standard are at once suggested by the rhetorical question in the *Best Building Company* case, supra (*Best Building Co. v. Employers' Liability Assur. Corp.*, 247 N. Y. 451, 160 N. E. 911, 71 A. L. R. 1464), 'We may ask what would constitute negligence in the failure to settle a case, as distinguished from bad faith,' and by the laconic observation of the Kentucky Court in *Georgia Casualty Company v. Mann*, 242 Ky. 447, 46 S. W. 2d 777, 779, 'The gift of prophecy has never been bestowed on ordinary mortals.' Nor within the policy limits has the insurer any contract obligation to effect settlement, as the policy contains no promise that it will do so under any and all conditions or circumstances, and none is to be implied, and beyond the policy limits the insurer has of course no authority to bind the assured by compromise in any amount whatsoever. The prevailing rule seems to be, however, that the insurer must act in good faith toward the assured in its effort to negotiate a settlement.

"The following cases also indicate that the bad faith theory is the proper one. *American Fidelity & Casualty Co. v. G. A. Nichols Co.*, 10 Cir., 173 F. 2d 830; *Noshey et al v. American Automobile Ins. Co.*, 6 Cir., 68 F. 2d 808; *Traders & General Ins. Co. v. Rudco Oil and Gas Co.*, 10 Cir., 129 F. 2d 621, 142 A. L. R. 799.

"Ordinarily under the terms of the policy the insurer is in full charge of the litigation, to the exclusion of the insured in the preparation of the defense, negotiation for settlement and other steps in the lawsuit. Its actions affect not only its own possible liability but also the possible liability of the insured which arises if the recovery exceeds the limits of the insurance contract. This casts upon the insurer the obligation of good faith, the breach of which gives rise to a cause of action in favor of the insured for any damage thereby sustained by him. The writer of the opinion well states the rule, 'Since this responsibility of an insurance company is read into the relationship between the insurer and the insured, and justly so, it would appear that the obligation of the insurer should not be extended beyond the duty of exercising good faith in the conduct of the matters arising from that relationship, particularly in the absence of legislation creating a different or higher standard. If the insurer has exercised good faith in all of its dealings under its policy, and if the settle-

ment which it has rejected has been fully and fairly considered and has been based upon an honest belief that the insurer could defeat the action or keep any possible judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment. Such a responsibility could hardly be claimed to be in contemplation of the insurance relationship.' "

Another interesting decision is *Zumwalt et al v. Utilities Ins. Co.,* Supreme Court of Missouri March 13, 1950 (re-hearing denied April 10, 1950) 228 S. W. 2d 750. A policy providing for damages not exceeding $10,000 for one injury was issued by the Utilities Insurance Company to the Zumwalt Company and was in existence on April 29, 1935 when the claimant, Carl Burneson, was injured. Burneson sued Zumwalt for $40,000. There were three trials; the first resulted in a mistrial because a juror fell asleep; the second trial terminated by disagreement; upon the third trial a verdict of $15,000 was secured. The insurer paid $10,000 with interest and the insured paid the balance. Thereupon the insured sued to recover for its excess payment and for attorney's fees and for punitive damages. Proof was introduced to the effect that the Burneson case could have been settled at different times for $8,500, $7,500 and $6,500, all figures within the $10,000 limit. The insurer had informed the insured that $5,000 of the $10,000 had been placed with a reinsurer, and offered to pay $5,000 toward a $7,500 settlement if the insured would pay $2,500. The insured then said that it was "very unfair when you could settle it for less than the policy limits." He was told by the insurer "Since you (addressing the insured) are not willing to pay anything, we will go ahead and try it." Holding the insurer liable under the bad faith doctrine, the District Court stated:

> "The courts are not in agreement in holding the insurer liable for negligence in refusing to settle, but there is no disagreement with respect to the insurer's liability where bad faith appears."

Stressing that the bad faith rule is a majority one, the District Court stated:

"We have reviewed many authorities on the question and think the weight of authority is that where the insurer in a liability policy reserves the exclusive right to contest or settle any claim brought against the assured, and prohibits him from voluntarily assuming any liability or settling any claims without the insurer's consent, except at his own costs, and the provisions of the policy provide that the insurer may compromise or settle such a claim within the policy limits, no action will lie against the insurer for the amount of the judgment recovered against the insured in excess of the policy limits, unless the insurer is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy. There are cases that hold that the insured is entitled to recover upon proof that the insurer in refusing to settle a claim for damages was guilty of negligence. But this test is rejected in the better reasoned cases and we think rightly so. Consult cases discussed in 71 A. L. R. 1484 and *Norwood v. Travelers Ins. Co.,* 204 Minn. 595, 284 N. W. 785, 131 A. L. R. 1496.

" 'Bad faith is, of course, a state of mind, indicated by acts and circumstances, and is provable by circumstantial as well as direct evidence. *Johnson v. Hardware Mutual Casualty Co.,* 108 Vt. 269, 286, 187 A. 788; *Sowder v. Lawrence,* 129 Kan. 135, 281 P. 921, 923. Each case must stand and be determined upon its particular state of facts.' *Johnson v. Hardware Mutual Casualty Co.,* 109 Vt. 481, 1 A. 2d 817, Loc. Cit. 822. That case held that bad faith on the part of the insurer would be the intentional disregard of the financial interest of insured in the hope of escaping the responsibility imposed upon it by its policy.

"In the case of *Boling v. New Amsterdam Casualty Co.,* 173 Okla. 160, 46 P. 2d 916, loc. cit. 918-919, that court said:

'The appellee (the insurer) then sought to coerce the appellant to assume a major portion of its liability, and this has been held to constitute bad faith.... The insurer must act honestly to effectually indemnify and save the insured harmless as it has contracted to do—to the extent, if necessary, that it must make whatever payment and settlement an honest judgment and discretion dictate, within the limits of the policy, and an abandonment of this duty to act sub-

sequent to its assumption in part constituted bad faith. *Maryland Cas. Co. v. Cook-O'Brien Const. Co.,* 8 Cir., 69 F. 2d 462; *American Mut. Liability Ins. Co. v. Cooper,* 5 Cir., 61 F. 2d 446; *Maryland Cas. Co. v. Elmira Coal Co.,* 8 Cir., 69 F. 2d 616; *Bartlett v. Traveler's Ins. Co.,* 117 Conn. 147, 167 A. 180. Contra: *Rumford Falls Paper Co. v. Fidelity & Casualty Co.,* 92 Me. 574, 43 A. 503.'"

The court noted that the company, by the terms of the contract, "had the insured tied hand and foot and thereby sought to coerce the insured to contribute a portion of its own liability in settlement of the suit so as to avoid being compelled to pay a larger sum through a verdict and judgment which every one concerned realized would result from a trial of the suit, unless, by chance. the insured might win."

The court held, however, that the insured was not entitled to punitive damages, stating that the insurer "looked after its own interests only, while, under the law, it owed a duty to the insured," but the court was unable to find that the insurer "maliciously, wilfully, intentionally or recklessly inflicted injury on the insured."

Bad faith has been defined as "the intentional disregard of the financial interests of the plaintiff (insured) in the hope of escaping the full responsibility imposed upon it (defendant insurer) by its policy." *Johnson v. Hardware Mutual Casualty Co.,* 1938, 109 Vt. 481, 1 A. 2d 817.

It is patent that both insurer and insured have certain rights under the policy. Where the rights conflict the cloud of bad faith may shadow the action or non-action of the insurer. It has been held that if the interests of the insurer conflict with those of the insured, the insurer is bound, under its contract of indemnity, and in good faith, to sacrifice its interests in favor of those of the insured. *Tyger River Pine Co. v. Maryland Casualty Co.,* 1933, 170 S. C. 286, 170 S. E. 346.

In imposing liability for the negligence of an insurer, the courts have held that the insurer is bound to exercise that degree of care which one of ordinary prudence would exercise in the management of his own affairs. *Ballard v. Ocean Accident & Guarantee Co.,* C. C. A. Wis. 1936, 86 F. 2d 449; *Attleboro Mfg. Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.,* C. C. A. Mass. 1917, 240 F. 573, 153 C. C. A. 377; *Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co.,* C. C. A. Mo. 1929, 32 F. 2d 425; *American Mut. Liability Ins. Co. of Boston, Mass. v. Cooper,* C. C. A. Ala. 1932, 61 F. 2d 446; *Maryland Casualty Co. v. Wyoming Valley Paper Co.,* C. C. A. N. H. 1936, 84 F. 2d 633; *Kleinschmit v. Farmers Mut. Hail Ins. Ass'n of Iowa,* C. C. A. Neb., 1939, 101 F. 2d 987; *Cowan v. Travelers Ins. Co.,* C. C. A. Ga. 1940, 114 F. 2d 1015; *Auto Mut. Indemnity Co. v. Shaw,* 1939, 184 So. 852, 134 Fla. 815; *Kingan & Co. v. Maryland Casualty Co.,* 1917, 115 N. E. 348, 65 Ind. App. 301; *Anderson v. Southern Surety Co.,* 1920, 191 P. 583, 107 Kan. 375, 21 A. L. R. 761; *Abrams v. Factory Mut. Liability Ins. Co.,* 1937, 10 N. E. 2d 82, 298 Mass. 141; *City of Wakefield v. Globe Indemnity Co.,* 1929, 225 N. W. 643, 246 Mich. 645; *Mendota Electric Co. v. New York Indemnity Co.,* 1926, 211 N. W. 317, 169 Minn. 377; *Farmers Gin Co. v. St. Paul Mercury Indemnity Co.,* 1939, 191 So. 415, 187 Miss. 747; *St. Joseph Transfer & Storage Co. v. Employers' Indemnity Corporation,* 1930, 23 S. W. 2d 215, 224 Mo. App. 221; *Cavanaugh Bros. v. General Accident, Fire & Life Assur. Corp.,* 1919, 106 A. 604, 79 N. H. 186; *Douglas v. U. S. Fidelity & Guaranty Co.,* 1924, 127 A. 708, 81 N. H. 371, 37 A. L. R. 1477; *McDonald v. Royal Indemnity Ins. Co.,* 1932. 162 A. 620, 109 N. J. L. 308; *Auerbach v. Maryland Casualty Co.,* 1923, 140 N. E. 577, 236 N. Y. 247, 28 A. L. R. 1294; *Wynnewood Lumber Co. v. Travelers' Ins. Co.,* 1917, 91 S. E. 946, 173 N. C. 269; *Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Maryland,* 1916, 155 N. W. 1081, 162 Wis. 39, Ann. Cas. 1918C, 399; *Hilker v. Western Automobile Ins. Co.,* 1930, 231 N. W. 257, 235 N. W. 413, 204 Wis. 1; *Schwartz v. Norwich Union Indemnity Co.,* 1933, 250 N. W. 446, 212 Wis. 593.

An insurer might be held liable for negligence in defending an action which it had undertaken although, by the terms of the policy, it was not required to so defend. *Attleboro Mfg. Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.,* C. C. A. Mass. 1917, 240 F. 573, 153 C. C. A. 377.

If an insurer fails to perfect an appeal, even though it had agreed to do so, thus preventing the insured from appealing, the insurer may be liable for a judgment above the policy limits. *McAleenan v. Massachusetts Bonding & Insurance Co.*. 1921, 232 N. Y. 199, 133 N. E. 444.

In one of the most interesting of all decisions during the current year, *Roberts*

v. American Fire & Casualty Co., U. S. D. C. Tenn. April 10, 1950, 89 Fed. Supp. 827, a Negro taxi driver, Albert Roberts, had obtained a $5,000/$10,000 liability policy from the American Fire & Casualty Company. An accident occurred involving one of Roberts' taxicabs and another automobile in which a Negro passenger, Eddie Lawrence Waller, was riding. Waller sued Roberts to recover damages in the sum of $25,000. Through his attorney, Waller offered to settle for $4,750, but the adjuster for the insurance company would pay no more than $3,000. Waller obtained a verdict of $18,000, which was affirmed upon appeal. The insurer then paid $5,000; Roberts paid the balance of $13,000 with interest. The *bona fides* of the insurer were seriously impugned. The adjuster had noted that the driver of the insured car "was not telling the truth or was not telling all he knew about the accident." Although the examining doctor had recommended a further examination and X-rays, his recommendations were disregarded by the insurer. The court noted that "bad faith is evidenced by hope of the insurance company, through its adjuster and agent, to escape payment in the full amount of the policy and in their utter disregard of the rights of the policyholder," adding in conclusion: "From all the facts and circumstances proved in this case, I cannot escape the conclusion, and therefore find, that the plaintiff in this case, Albert Roberts, an old colored man, was not only being pushed around by the court in Montgomery County, but also by the defendant insurance company in this case, who was paid to represent his interest." The insurer had not investigated the case efficiently and had completely ignored the advisability of a propitious settlement within the confines of the policy and elected to gamble on the verdict of the jury since this was a case where one Negro was suing another. The United States District Court, in finding lack of good faith on the part of the insurer, made these pertinent observations:

> "The events transpiring after the accident and immediately prior to the trial of the case in the Circuit Court of Montgomery County, Tennessee, are a sad commentary on the regard, or light regard, that is entertained by some lawyers and some of the trial courts of this state regarding the rights of its Negro citizens. It has crept into the record in one way or another that here was a case where one Negro man was suing another Negro man, and that the plaintiff being a Negro the case wasn't worth over $3,500 in any event. That Tennessee Courts don't give substantial judgments in cases where the parties are Negroes. The Court has received that impression throughout the trial of this case from events that transpired and statements made by witnesses, and necessarily finds that the fact that the plaintiff in the damage suit in Montgomery County, Tennessee, was a Negro did enter into the fact that no larger amount was considered by the defendant company in payment of liability in this case; and another instance of this sort of prejudice is the fact that the plaintiff in this case who is a Negro and who was defendant in the damage suit in Montgomery County, was a rather successful Negro. He had built up a good business and was thought to have some money, and this was well known in Montgomery County where he resides and where the trial was before a jury of Montgomery County citizens. It has crept into the record that one of the main reasons the Montgomery County jury gave such a large judgment against him was on account of the fact that he was a Negro, and had accumulated property, and that there was prejudice existing against him on the part of the jurors."

In *Hart v. Republic Mut. Ins. Co.,* 1949 152 Ohio St. 185, 87 N. E. 2d 347, the Court of Appeals of Ohio held that the bad faith rule is the law of Ohio. An insurer, whose policy maximum was $6,000 for one injury, was given an offer to settle for $4,500, later reduced to $4,000. The verdict of the jury in favor of the claimant was in the sum of $19,400, which was reduced upon appeal to $12,000. The insurer paid its $6,000 and the claimant levied upon one of the assured's trucks valued at $3,600. The insured then sued the insurer to recover damages in the sum of $3,600, which was allowed by the jury and affirmed on appeal. The Appellate Court declared that the bad faith of the insurer was established since its conduct was arbitrary and capricious. The Court adduced bad faith on the following facts and inferences: That claimant's injuries were serious and permanent; that the insurer had no eye-witnesses to sustain its claim of nonliability; that the first offer of settlement

was small, a fraction of the amount of the jury's verdict; that insured made repeated attempts to have the company assist in finding some solution; the insured explained to the President and the general counsel of the insurer that his two trucks were his only means for supporting himself and his family; and that the President and general counsel of the insurer failed to keep an appointment with the insured.

There is a strong dissenting opinion by Mr. Justice Taft, in which Mr. Justice Stewart concurs, in which they find no more blameworthy nor reprehensible conduct on the part of the insurer than its failure to settle, observing that "Nowhere in the contract does defendant agree to settle any claim." In the dissenting opinion the insured is taken to task for his failure to compromise the excess liability:

"However, nothing in the policy provides against or limits the right of plaintiff to compromise the uninsured portion of his liability—that is, the portion above the policy limits.

"There are no allegations as to representations by defendant or the concealment of facts which defendant should have disclosed. There are no allegations that defendant did or failed to do anything which prevented plaintiff from compromising, or induced him not to compromise, the uninsured portion of his liability.

"Plaintiff paid for a policy giving him the minimum protection against liability which the law required him to carry. He could have purchased greater protection if he had been willing to pay a higher premium.

"If, as plaintiff alleges, it appeared that a judgment against him 'would probably be in an amount considerably in excess of . . . policy limits,' then plaintiff had a probable uninsured liability in a substantial amount. He had not paid for protection against such liability except to the extent that defendant's agreement to defend might provide such protection. It does not appear that plaintiff ever expressed any willingness to pay anything toward compromising this uninsured portion of what he characterizes as 'probable' liability until after defendant declined to settle. Now plaintiff seeks to collect from defendant what it cost plaintiff to compromise the uninsured portion of his liability after defendant has paid in full and with interest the insured portion."

As indicative of the tendencies in Appellate tribunals in certain State and Federal courts, the following citations may serve as barometer readings:

Policy $10,000. Settlement could have been effected for $10,000. Verdict for $22,360, reduced to $15,500. Insured sued to recover $5,500 from the insurer, which was allowed and affirmed in the Circuit Court of Appeals, Tenth Circuit, March 21, 1949, holding that in Oklahoma "the insurer and the insured owe to each other the duty to exercise the utmost good faith." and the Court added: "While the insurance company in determining whether to accept or reject an offer of compromise, may properly give consideration to its own interests, it must, in good faith, give at least equal consideration to the interests of the insured, and if it fails so to do it acts in bad faith." *American Fidelity & Casualty Co., Inc. v. G. A. Nichols Co.*, U. S. C. A., 10th Cir., Okla., 173 Fed. 2d 830.

Policy limits $5,000. Settlement demand $1,700, increased to $3,900. Verdict for $10,000. Insured sued to recover excess of $5,000, alleging bad faith on the part of the insurer in refusing to accept the offers of compromise for amounts less than the policy limits. Judgment in favor of the insured, affirmed on appeal.

"It is conceded that an insurer, such as defendant herein may so conduct itself as to be liable for an entire judgment recovered against an insured even though the judgment exceeds the amount of liability named in the policy. The following apt expression from this court is found in the opinion in the case of *Boling v. New Amsterdam Casualty Co.*, 173 Okla. 160, 46 P. 2d 916, 917, 919:

" 'It may be stated as a rule of law that where an insurance company agrees to indemnify against loss from personal injury claims, conditions upon insured's surrendering to the insurance company control of investigations, adjustments of claims, and defenses of lawsuits, and where the insurance company does, pursuant to such contract, take control of such matters, a relationship arises between insured and insurer which imposes on the insurer the duty owing to the insured to exercise skill, care and good faith to the end of saving the in-

sured harmless, as contemplated by the contract to indemnify. The insurer must act honestly to effectually indemnify and save the insured harmless as it has contracted to do—the extent, if necessary, that it must make whatever payment and settlement an honest judgment and discretion dictate, within the limits of the policy, and an abandonment of this duty to act subsequent to its assumption in part constituted bad faith. *Maryland Casualty Co. v. Cook-O'Brien Const. Co.*, 8 Cir., 69 F. 2d 462; *American Mutual Liability Ins. Co. v. Cooper,* 5 Cir., 61 F. 2d 446; *Maryland Casualty Co. v. Elmira Coal Co.*, 8 Cir., 69 F. 2d 616; *Bartlett v. Travelers' Ins. Co.*, 117 Conn. 147, 167 A. 180; Contra: *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 92 Me. 574, 43 A. 503.'

"Herein it was apparent that if there was any liability for the death of Doty it was far beyond the limits of the policy. After the suit was filed by the administratrix alleging a state of facts, which if proven would result in judgment against plaintiff in excess of policy limits, the defendant was bound to give the rights of the plaintiffs at least as much consideration as it did its own in determining whether or not to effect a settlement.

"As was said in *Douglas v. United States Fidelity & Guaranty Co.*, 81 N. H. 371, 127 A. 708, 37 A. L. R. 1477:

" 'An indemnity insurer who stands to lose only a part of a litigated claim in case he refuses to settle it, while the insured stands to lose the balance, is bound to give the rights of the insured at least as much consideration as it does its own in determining whether or not to effect a settlement.'

"In *Johnson v. Hardware Mutual Casualty Co.*, 109 Vt. 481, 1 A. 2d 817, 820, bad faith was alleged in the refusal to accept an offer of settlement.

"As applied to this case, bad faith on the part of the defendant would be the intentional disregard of the financial interests of the plaintiff in the hope of escaping the full responsibility imposed upon it by its policy.

"It was the right of the defendant to exercise its own judgment upon the question of whether the claim should be settled or contested but its decision must be in good faith and with consideration of the interests of plaintiffs. It should be the result of the weighing of probabilities in a fair and honest way after obtaining the facts upon which liability is predicated.

"We do not go so far as to say that in every instance where there exists a possibility of a verdict against the insured and the nature of the injuries are such that in the event of such verdict in all probability it will exceed the policy limits, a refusal by the insurer of an offer of settlement within the policy limits constitutes bad faith. But under such circumstances a decision to contest the claim should be subjected to close scrutiny for if based on a mere chance that the claim might be defeated and not on a *bona fide* belief that the action will be defeated a refusal of such an offer of settlement would not be good faith.

"Under those circumstances when viewed in a light most favorable to plaintiffs it might with reason be said that defendant knew it had no more than an equal chance of success in wholly defeating the action, and that there was no chance of a verdict within the policy limits.

"As was said in the body of the opinion in *Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Maryland,* 162 Wis. 39, 155 N. W. 1081, 1087, Ann. Cas. 1918 C. 399:

" 'While the defendant had the right to consult what it deemed to be its own interest in making a settlement, it could not abuse the power vested in it and recklessly and contumaciously refuse to settle if it was apparent that in all reasonable probability its conduct would not only result in damage to the plaintiff, but also in loss to itself.'

"In *City of Wakefield v. Globe Indemnity Co.*, 246 Mich. 645, 646, 223 N. W. 643, 645, we note this expression:

" 'On the other hand, arbitrary refusal to settle for a reasonable amount, where it is apparent that suit would result in a judgment in excess of the policy limit, indifference to effect of refusal on the insured, failure to fairly consider a compromise and facts presented and pass honest judgment thereon, or refusal upon grounds which depart from the contract and the purpose of the grant of power, would tend to show bad faith.' "

National Mutual Casualty Co. v. Britt, (Supreme Court of Oklahoma, November 1948) 200 P. 2d 407.

Insured had policy of $5,000. Claim could have been settled for $4,000 or $4,700. Verdict $12,000. The insured was permitted to recover for the excess in New Hampshire because the insurer had negligently failed to protect his interests and it failed to exercise the caution and prudence of that elusive, if not illusory, ordinary and average person. *Dumas v. Hartford Accident and Indemnity Co.*, 1947, 94 N. H. 484, 56 A. Rep. 2d 57 (re-hearing denied January 6, 1948).

In Texas the negligence theory was followed in *Highway Insurance Underwriters v. Lufkin-Beaumont Motor Coaches, Inc.*, 1948, 215 S. W. 2d 904. In that case the policy limits were $5,000. Action was instituted for $65,000 although the claimant was willing to settle for $4,500. Verdict was obtained in the sum of $11,000. The insured was permitted judgment against the insurer for the excess payment of $6,000. This case is the leading authority for the modern yiewpoint that liability for excess recoveries may be predicated upon the insurer's negligence.

However, in my judgment, the most informative decision, embodying as it does the most profound, lucid and pertinacious dicta, is *Royal Transit Inc. v. Central Surety & Ins. Corporation,* Circuit Court of Appeals Seventh Circuit, June 1, 1948, 168 Fed. 2d 345. A brief resume of the facts reveals that the insured, Royal Transit Inc., had placed an automobile liability insurance policy with a limit of $45,000 for the death or bodily injury of a single person, with the Central Surety & Insurance Corporation which insurer retained $5,000 of the coverage and placed the difference of $40,000 with the Employers' Re-insurance Corp. of Kansas City. One Zamecnik was seriously injured and instituted an action in the Circuit Court of Milwaukee County, Wisconsin, for damages against the Royal Transit Inc., in the sum of $100,000. Settlement could have been effected for $40,000, of which the Royal Transit Inc. agreed to pay $5,000 and the re-insurer was willing to pay $30,000. The primary carrier, the Central Surety, steadfastly refused to make any contribution toward the settlement. A verdict was obtained by Zamecnik against Royal Transit Inc. in the sum of $62,500, which was affirmed on appeal by the Supreme Court of Wisconsin (*Zamecnik v. Royal Transit Inc.*, 239 Wis. 175, 300 N. W. 227). The insured, Royal Transit Inc. then sued the primary insurer, Central Surety & Insurance Corporation, alleging bad faith in failing to settle within the policy limits. The Central Surety had forwarded to the insured the customary "on notice" letter, which stated: "There is a likelihood that a judgment may be entered in this action for an amount much in excess of the limit of your policy of insurance." The Circuit Court apparently interpreted the transmittal of this letter as recognition by the insurer of excess possibilities requiring that "its decision not to settle should be an honest decision. It should be the result of the weighing of probabilities in a fair and honest way. . . . It must be honest and intelligent if it be a good-faith conclusion."

In the *obiter dicta* of the court is this noteworthy observation:

> "The mere fact that the defendant was unsuccessful either in the trial or in the Supreme Court (on appeal) does not of itself show that the defense was not made in good faith. Many a legal battle has been lost notwithstanding a good-faith defense, and perhaps some have been won on a defense of little merit."

But the Circuit Court felt in the case under consideration that "any belief entertained by the defendant that it could successfully defend the cause of action there asserted, must have sprung from an optimism unrelated to the realities of the situation." The determining and decisive factor against the assured was the obstinate and ornery refusal of the primary insurer to entertain any settlement overtures whatsoever, despite the fact that both insured and re-insurer were willing to make a contribution of $35,000 toward the settlement and the primary insurer was only requested to contribute its initial $5,000.

A representative of the primary insurer testified that he refused to make any settlement offer as a "horse-trading proposition." The Circuit Court astutely remarked: "Even a 'horse-trader' if successful, must at some point make an offer," and further found that such refusal was "arbitrary, capricious and without any rational basis." Accordingly, the primary carrier was compelled to pay the overage of $17,500 with interest and costs.

While fraud, bad faith or lack of good faith on the part of an insurer toward an insured have long been recognized, in every jurisdiction, as vehicles for the repayment to an insured of judgments in excess of policy limits, there has been a noticeable

broadening of the base making negligence the criterion. Some authorities apparently use the two terms indiscriminately and hold that the insurance company must not act either in bad faith *or* negligently. *State Automobile Insurance Co. v. York,* 104 F. 2d 730; *Burnham v. Commercial Casualty Co.,* 10 Wash. 624, 117 P. 2d 644.

In some jurisdictions both the bad faith rule and the negligence rule are in vogue; in every jurisdiction at least the bad faith rule is recognized authority for excess liability.

Payment by the Insurer of the Face Value of the Policy

There is a conflict of law as to whether the insurer's duty to defend and to pay judgments are correlative or distinct and separate. In other words, in some jurisdictions there have been holdings that the insurer would have to defend even though it might not be liable for the payment of the ultimate judgment by reason of some policy exclusion. This is apparently the minority view. *City Poultry & Egg Co. v. Hawkeye Casualty Co.,* 1941, 298 N. W. 114, 297 Mich. 509; *Kinnan v. Charles B. Hurst Co.,* 1925, 148 N. E. 12, 317 Ill. 251; *Fullerton v. U. S. Casualty Co.,* 1918, 167 N. W. 700, 184 Iowa 219; *Mannheimer Bros. v. Kansas Casualty & Surety Co.,* 1921, 184 N. W. 189, 149 Minn. 482; *Minnesota Electric Dist. Co. v. U. S. Fidelity & Guaranty Co.,* 1927, 216 N. W. 784, 173 Minn. 114; *U. S. Fidelity & Guaranty Co. v. Cook,* 1938, 192 So. 24, 186 Miss. 840; *Lumbermens Mutual Casualty Co. v. DeLozier,* 196 S. E. 318, 213 N. C. 334; *Union Indemnity Co. v. Mostov,* 1932, 181 N. E. 495, 41 Ohio App. 518.

The great weight of authority is *contra. Greer-Robbins Co. v. Pacific Surety Co.,* 1918, 174 P. 110, 37 Cal. App. 540; *Morgan v. New York Casualty Co.,* 1936, 188 S. E. 581, *Schneider v. Autoist Mut. Ins. Co.,* 1931, 178 N. E. 466, 346 Ill. 137; *Fessenden School v. American Mut. Liability Ins. Co.,* 1935, 193 N. E. 558, 289 Mass. 124; *Kramarczyk v. Jontz,* 1937, 275 N. W. 822, 282 Mich. 208; *U. S. Fidelity & Guaranty v. Yazoo Cooperage Co.,* 1930, 127 So. 579, 157 Miss. 27; *Pickens v. Maryland Casualty Co.,* 1942, 2 N. W. 2d 593; *Mason-Henry Press v. Aetna Life Ins. Co.,* 1914, 105 N. E. 826, 211 N. Y. 489; *Royal Indemnity Co. v. Schwartz,* Civ. App. 1915, 172 S. W. 581; *Ocean Accident & Guarantee Corp. v. Washington Brick & Terra Cotta Co.,* 1932, 139 S. E. 513, 148 Va. 829.

In *Lumbermens Mutual Casualty Co. v. McCarthy,* 1939, 8 Atl. 2d 750, 90 N. H. 320, the insurer paid the full limits of its policy coverage for injuries sustained by an infant, and the court thereupon held that it was not required to defend an action for loss of services, resulting from the same accident, instituted by the infant's father. If this were universally followed then whenever an insurer were faced with a claim which had a potential as great as the policy coverage, or greater, it could, by paying to the extent of its coverage, relieve itself of the expense of defending the action.

> "This result is subject to censure, however, when we consider that the insurer's duty is both to defend actions *and* to pay judgments obtained against the insured. Otherwise, where the damages exceed the policy coverage. the insurer could walk into court, toss the amount of the policy on the table, and blithely inform the insured that the rest was up to him. This would obviously constitute a breach of the insurer's contract to defend actions against the insured, for which premiums had been paid, and should not be tolerated by the courts." 8 Appleman's Insurance Law and Practice 21, Sec. 4685.

It is entirely conceivable that under the prevailing liberal trend an insurer may pay an injured claimant to the full extent of the policy limits and thereafter, because of the insurer's negligence in the defense or through bad faith or fraud, become liable to the insured for the repayment of the judgment above the policy limits.

Indeed, the foundation for the edifice of judicial authority assessing insurers for the coverage begins and ends with its conduct after the claim has been reported and throughout the divers stages of the litigation.

Attorneys' Fees

In many instances where an insured has brought action against an insurer for excess recoveries a companion action has been instituted to recover attorneys' fees and legal disbursements incurred by the insured in the prosecution of his action against the insurer. In one case this was submitted to the jury on a special question and the reasonable attorneys' fees were fixed by the jury at $750.00. *Employers Casualty Co. v. Hicks Rubber Co.,* (Court of Appeals–

Texas) 160 S. W. 2d 96. This was reversed, however, in *Traders & General Ins. Co. v. Hicks Rubber Co.*, 169 S. W. 2d 142, on February 17, 1943. The Supreme Court of the State of Texas declared that a judgment for attorneys' fees was "without basis in the insurance contract and without authority of any law in force in the state."

In the case of *Zumwalt v. Utilities Ins. Co.*, March 13, 1950, Supreme Court of Missouri, rehearing denied April 10, 1950, 228 S. W. 2d 750, the insured sought to obtain payment of the fees for his attorney in the action to recoup the excess payment. The Supreme Court of Missouri, however, refused to permit such action, stating that it could only be maintained *ex contractu*, and declaring that the action to recover the attorneys' fees is "not an action to recover 'any loss under a policy' of insurance. It is true it grew out of a contract, a policy of insurance. No action *on a contract* will lie against an insurance company for that part of a judgment recovered against the insured which is in excess of the policy limit. See 131 A. L. R. 1500."

In another case, the insurer was not required to pay attorneys' fees to counsel whom the insured engaged to guard against a judgment in excess of insurance coverage. *McCabe v. Employers' Liability Assurance Corp.*, 1937, 192 S. E. 687, 212 N. C. 118.

The Right to Sue for Excess Recovery

The insured is invariably interested when a judgment is rendered against him in excess of the amount named in his policy, but he is not alone. The claimant who is transformed from plaintiff to judgment-creditor is indeed concerned in obtaining full payment of the amount awarded; perhaps a re-insurer may be involved.

Does an insured have to make payment before he may sue his insurer?

It was originally held that the right to recover does not accrue until payment has been made.

Milstein v. City of Troy, 272 App. Div. 625, 74 N. Y. S. 2d 892; *Dunn v. Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 67 N. E. 439; *Satta v. City of New York, Appellant, Brooklyn Union Gas Co., Respondent;* 272 App. Div. 782, 69 N. Y. S. 2d 653; *Tri-State Casualty Ins. Co. v. Stekoll*, 208 P. 2d 545; *Curtis & Gartside Co. v. Aetna Life Ins. Co.*, 58 Okl. 470, 160 P. 465; *Poe v. Philadelphia Casualty Co.*, 118 Md. 347, 84 A. Rep. 476; *Amer. Emp. Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305; *Schubert v. August Schubert Wagon Co.*, 249 N. Y. 253; 164 N. E. 42, 64 A. L. R. 293; *City of Rochester v. Campbell*, 123 N. Y. 405, 413, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760; *Maryland Casualty Co. v. Peppard*, 53 Okl. 515, 157 Pac. 106; *Kendall v. Green*, 67 N. H. 557, 42 Atl. 178; *Lewinthan v. Insurance Co.*, 61 Misc. Rep. 621, 113 N. Y. Supp. 1031; *Clark v. Bonsal*, 157 N. C. 270, 72 S. E. 954, 48 L. R. A. (N. S.) 191; *Anoka Lumber Co. v. Company*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; *Sanders v. Insurance Co.*, supra; *Hoven v. Insurance Co.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388; *Fenton v. Insurance Co.*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770, 78 Am. St. Rep. 792; *Carter v. Aetna Life Ins. Co.*, 91 Pac. Rep. 178; *Shea v. United States Fidelity Co.*, 98 Conn. 447, 120 At. Rep. 286.

In order for an insured to maintain his action against an insurer, whether it be in bad faith or in negligence, does the insured have to pay the excess?

Let us assume that a judgment has been entered against an insured which remains unpaid. That subjects him to credit embarrassment; he may be examined in proceedings supplementary to execution; he may be threatened with garnishment. He may lose many opportunities to purchase real property because, with a judgment extent, he will not be considered a good mortgage risk. He may wish to buy an automobile, a refrigerator, a radio or a television set on time payments but will be denied such consideration because inquiry will disclose the existence of a judgment against him. In order to remove the impediment of the judgment he may resort to the stigma of bankruptcy. That raises the question as to whether an insured has to make a payment in full or on account of the excess recovery in order that he might have established appropriate capacity to institute the suit, upon the theory of *injuria absque damno.*

In view of the inclination of the courts to favor an insured who has been prejudiced by the improvident action of his own insurer, payment may not be necessarily imposed as a condition precedent to an action against the insurer provided the insured may show that he has in fact suffered damage in another form.

Mary K. Yeroyan instituted an action in New Hampshire against Eugene D. Duncan to recover damages for personal injuries which she allegedly suffered. Duncan

was insured in the Lumbermens Mutual Casualty Company for $5,000. Mary K. Yeroyan offered to settle within the limits of the policy but the insurer rejected her offer. She obtained a verdict of $7,500 and the insurer paid $5,000. Duncan did not make any payment in excess of the policy limits so Mary K. Yeroyan sued the Casualty Company to recover the balance due on her judgment against Duncan because the insurer had rejected her offer of settlement.

In *Duncan v. Lumbermens Mutual Casualty Co.*, 1941, 91 N. H. 349, 23 A. 2d 325, the court stated:

"While a liability insurance company may be liable to its insured for negligence in failing to adjust a claim covered by its policy of insurance (*Douglas v. United States Fidelity and Guaranty Company*, 81 N. H. 371, 127 A. 708, 37 A. L. R. 1477; *Cavanaugh Bros. v. General, etc. Assur. Corporation*, 79 N. H. 186, 106 A. 604), it does not follow that the claimant may complain of the negligence in question, for the duty of the insurer to exercise care in the handling of a claim against the insured arises from the relationship created by the policy. *Douglas v. United States Fidelity and Guaranty Company*, supra, 81 N. H. 376, 127 A. 708, 37 A. L. R. 1477. The rule of *Sanders v. Frankfort, etc. Insurance Co.*, 72 N. H. 485, 57 A. 655, 101 Am. St. Rep. 688, cannot be expanded to cover the present situation, since the policy here involved contains no provision for indemnity beyond the requirement that the insurer shall satisfy the judgment against the insured to the amount stipulated in the policy. This the defendant company has done. *Lumbermens Mut. Casualty Co. v. Yeroyan*, 90 N. H. 145, 147, 5 A. 2d 726.

"An insured defendant who has paid a judgment in excess of the amount for which he is insured may of course recover the excess from the insurance company on proof that the company has negligently failed to settle the claim within the policy limit. This was the situation in the Douglas case. But 'liability for negligence is imposed only for injuries resulting from the particular hazard against which the duty of due care required protection to be given.' (*Flynn v. Gordon*, 86 N. H. 198, 202, 165 A. 715, 717) and the duty of an insurance company to protect its insured against liability cannot consistently be extended to include protection to the one who is seeking to hold the insured liable.

"In short, conduct to be legally wrongful must contravene some duty which the law attaches to the relation between the parties (*Garland v. Boston & M. Railroad*, 76 N. H. 556, 565, 86 A. 141, 46 L. R. A., N. S. 338, Ann. Cas. 1913 E, 924) and it is clear that no relationship here exists between Mary K. Yeroyan and the defendant company which would permit the maintenance of the present action."

Judgment in favor of the carrier was affirmed.

To similar effect was the case of *Francis v. Newton*, 75 Ga. A 341, 43 S. E. 2d 284 (1947). In that case Newton, who had $5,000 insurance coverage, was sued by Marvin Francis. Judgment was obtained in the sum of $7,500. The insurer paid its limit of $5,000. Thereupon Francis endeavored to collect the excess from the insurer. Judgment was rendered in favor of the insurer on demurrer and affirmed upon appeal by the Georgia Court of Appeals, with the following observation:

"While an automobile liability insurance company may be held liable for damages to its insured for failing to adjust or compromise a claim covered by its policy of insurance, where the insurer is guilty of negligence or fraud or bad faith in failing to adjust or compromise the claim to the injury of the insured (*Cavanaugh Bros. v. General Accident Fire & Life Assurance Corporation*, 79 N. H. 186, 106 A. 604; *Douglas v. U. S. Fidelity & Guaranty Co.*, 81 N. H. 371, 127 A. 708, 37 A. L. R. 1477; *Tiger River Pine Co. v. Maryland Casualty Co.*, 163 S. C. 229, 161 S. E. 491; *Tiger River Pine Co. v. Maryland Casualty Co.*, 170 S. C. 286, 170 S.E. 346; *J. Spang Baking Co. v. Trinity Universal Insurance Co.*, Ohio App., 68 N. E. 2d 122; *American Mutual Liability Insurance Co. of Boston v. Cooper*, 5 Cir. 61 F. 2d 446; *Maryland Casualty Co. v. Elmira Coal Co.*, 8 Cir. 69 F. 2d 616), it does not follow that a person injured by the insured and who is not a party to the insurance contract may complain of the negligence or bad faith of the insurer towards the policy holder in failing to adjust or compromise a claim against such policyholder,

for the duty of the insurance company to use ordinary care and good faith in the handling of a claim against its insured arises out of the relationship created by the contract or policy of insurance and there is no fiduciary relationship or privity of contract existing between the insurer and a person injured by one of its policyholders."

It is readily apparent that issues frequently arise between an insurer and a re-insurer. One important instance illustrating such a situation was involved in *American Fidelity & Casualty Co. v. All American Bus Lines,* United States Circuit Court of Appeals 10th Circuit, December 28, 1949, 179 Fed. 2d 7. In that case All American Bus Lines had $20,000 insurance coverage. The primary insurer, for $10,000, was the American Fidelity & Casualty Company and the re-insurer, also for $10,000, was the Security Mutual Casualty Company. While these two policies were in force Lorena Lairson was injured, and sued for $30,500. She obtained a verdict in the sum of $25,000. While the appeal was pending the judgment was compromised for $17,500. The primary insurer paid $10,000 and the Bus Company paid the excess of $7,500. The excess insurer reimbursed the Bus Company for its payment of $7,500. The insured then sued the primary carrier for re-payment of the sum of $7,500 and a verdict was rendered in favor of the assured because of the bad faith and gross negligence of the insurer. The Circuit Court of Appeals reversed the judgment upon the ground that modern statutes had abolished the distinction between law and equity and required that actions be brought in the name of the real party in interest. Since the insured who had been paid in full by the re-insurer, was not the real party in interest it was not entitled to bring an action against the primary insurer even though the primary insurer was a third party tortfeasor because of its bad faith. The cause of action against the primary insurer, however, does not extend to the re-insurer or excess carrier. *Jackson v. Citizens Cas. Co. of N. Y.,* 277 N. Y. 385, 14 N. E. 2d 446; *Gutride v. General Reassurance Corp.,* May 17, 1938, 167 Misc. 608, 4 N. Y. S. 2d 387.

While there is no privity of contract between a claimant and an insurer, the claimant may sue on the policy as a judgment-creditor under the Insurance Law of such States as New York (Sec. 167 Ins. Law). Nevertheless, the injured claimant, even though a judgment-creditor, may not sue to recover payments in excess of the policy limits nor can the excess carrier sue to recover against the primary carrier even though the excess carrier be without fault and the primary carrier be guilty of gross negligence or bad faith. The right to sue for excess payments is vested solely in the insured who must show payment in full or on account or some other damage by reason of the existence of the excess judgment, to maintain his action against the insurer.

Proposed Legislative Enactments

In 1949 a bill was introduced in the Ohio Senate with respect to excess liability and passed by a vote of 20 to 10. It provided that in the event an offer of settlement within the policy limits was rejected by an insurer, without the consent or approval of the insured, the insurer would then be liable if the eventual judgment were in excess of the policy limits.

In the 1950 Legislature of the State of New York a bill was introduced to amend Sub-section 2, Section 167 of the Insurance Law, relating to the provisions of motor vehicle liability policies, to additionally provide that in any case where notice is given to the insurer by or on behalf of an injured person, or any other person, of a claim against the insured exceeding the amount of the applicable limit of coverage, the insurer shall immediately give written notice of such fact to the insured, and of the liability of the insured for any settlement or judgment exceeding the amount of such coverage, and shall advise the insured of his right to be represented by counsel. Failure to give such notice would subject the insurer to liability for the full amount of any settlement or judgment; and the bill would further provide that in any case where the insurer refused or neglected to accept a bona fide offer to settle the claim of an injured person or any other person within the amount of the applicable limit, the insurer shall be liable for the full amount of any subsequent settlement or judgment.

This bill was never voted out of committee.

There may be anticipated in those and in other States more extensive efforts for the passage of laws which, if enacted, would make the insurer liable for the excess even though the insurer acted in good faith and without negligence.

Conclusion

The potential of liability insurance may be as wide as the prairies and as high as the mountains. The courts are permitting inquires of microscopic detail as to the vigilance and efficiency with which an insurer acts to protect the interests of its insured when notified of the existence of the claim. It is incumbent upon the insurer that its personnel be composed of men of experience who act diligently and zealously, not only to serve the insurer but to protect faithfully and assiduously the interests of the assured.

Recommendations of investigators should be somberly weighed. Is the claimant seriously injured? Can he establish painful and permanent *sequelae?* If so, the insurer has some justification to anticipate that a verdict of substantial proportions may be obtained, a verdict above the policy coverage. The insured and the insurer are thereupon jointly and severally involved and the insured, though completely dependent upon the advice of counsel and defense interposed by his insurer, may be carrying the far greater hazard. The report of the insurer's examining doctor may be the yardstick.

The attorneys retained to defend the insured should be competent, erudite members of the Bar, who are specialists in that phase of litigation. Whether they be endowed with the right to settle or not, their advice and recommendation should not be lightly regarded by the Home Office. The general in the field is confronted with the personal aspects of the contest and may have far better judgment as to the tide of battle than the staff some distance away in headquarters.

In short, for the protection of all concerned, the insurer must continually keep a skillful finger on the pulse of the claim and the case.

Mindful of the vagaries and vicissitudes of contemporaneous jurisprudence when excesses were no less prevalent than now, Dr. Samuel Johnson philosophically observed:

> "Testimony is like an arrow shot from a long bow; the force of it depends on the strength of the hand that draws it. Argument is like an arrow from a crossbow; which had equal force though shot by a child."

Workmen's Compensation—Arising Out of Employment

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IT IS generally provided in the Workmen's Compensation Acts that an injury to be compensable must arise out of and be in the course of employment. The Pennsylvania, Texas and Washington Acts read "In course of employment," West Virginia "In the course of and resulting from," and Wisconsin "Growing out of or incidental to employment." The exact wording is to be followed. There is, however, a border line between compensation benefits owing and compensation benefits not owing. The insurers and the courts try to give liberal construction to the terms set forth in the Acts; minds of men often differ as to what it should be and thus litigation is unavoidable. In most insurance companies the compensation claims are about 50% more in number than other personal injury claims. Most of the debatable claims are ended at the first hearing but nevertheless there is a vast number that go up on appeal. In the preparation of this paper only decisions during the past five years have been studied and these mainly from the Courts of Last Resort. Sixty percent of these appealed cases were won by the defendants.

The facts as found by the Board or the Commission at the first hearing may not justify the conclusion as a matter of law. This is illustrated in a recent decision by the Supreme Court of Michigan, *Lauscher v. Montgomery Ward,* 41 N. W. 2nd 892,

where an employee was instructed to take an empty drum which had contained antifreeze mixture across the alley and place it in a warehouse. While crossing the alley the drum fell and a pint or two of the mixture ran out and the employee attempted to set fire to it when an explosion followed and he was killed. The Commission found in claimant's favor. The court on appeal reversed, holding compensation was not owing and stating: "All of his acts concerning setting fire to this inflammable fluid were things that he had not been directed to do and were outside of the line of duty which had been marked out for him by the command of his superior Krause. It was the obligation of decedent to perform his duties within the scope of his employment as directed by his employer." Another late decision, *Sanford v. A. P. Clark Motors,* 45 Southern 2nd 185, by the Supreme Court of Florida is where the referee found for employer; the full Commission reversed, finding for claimant; on appeal to the Circuit Court the order of the full Commission was reserved and the claim denied; the Supreme Court reversed the Circuit Court, granting compensation. The employee had been directed to take an automobile engine from Orlando to Cocoa, thirty miles to the southeast. There was such marking on the engine and there was also a tag on the engine addressed to a motor concern in Wildwood ten miles northwest of Orlando. The employee was found dead on the direct route to Wildwood. That the employee had been directed to take the engine to Cocoa was undisputed and that he was not on the road to Cocoa at the time of the accident was also not disputed. The court said in the syllabus: "Absence of positive showing to contrary in compensation proceedings, the law indulges presumption that accident occurred while injured employee was in course of employment, and when employer denies that employee was in course of employment, burden is on employer to prove that accident did not take place in course of employment. and employer must establish such denial by direct and positive evidence, and negative evidence will not suffice." The direct route to Cocoa was closed and the detour road and the road to Wildwood both left Orlando in a northerly direction, one to the northwest and the other to the northeast. The Supreme Court said that "for all the record discloses the deceased may have inadvertently missed his way departing from Orlando and was killed in the accident before he discovered he was on the wrong way." There was no showing whatever that he had abandoned his employer's business and was engaged in a personal mission and hence the decision in favor of the claimant. In the Michigan case the employee beyond question disobeyed his instructions and in the Florida matter there is no such evidence and furthermore if the driver through misunderstanding had been taking the engine to Wildwood he was still on his employer's business in transporting the engine; he had not undertaken to do something else as in the Michigan case.

Traveling salesmen are always on the employer's business from the time they leave home until they return. In *Thornton v. Hartford Accident,* Georgia Supreme Court, 32 S. E. 2nd 816, the salesman was fatally injured by a fall while crossing street to return to the hotel where he was registered, after eating dinner at a cafe across the street from the hotel. His death "arose out of and in course of employment." No compensation was owing to an employee who owned his truck, who when hauling for the employer was paid by the hour for driving the truck and by the hour for the use of the truck, and at the time of the accident was moving his truck from an excavation job for the purpose of repairing the truck. The thing he was doing was not in the interest of his employer; *Rector v. Ragnar* (Mich.), 21 N. W. 2nd 129. In a California case by the Supreme Court of that State, *Pacific Ind. Co. v. Ind. Com.,* 159 Pacific 2nd 625, it was held there was causal connection between the employment and the death of a minor employee when employees were permitted to wash up after work in an irrigation reservoir where one was drowned in attempting to rescue his brother. Compensation was owing in Kentucky, *Jefferson County Stone Co. v. Bettler,* 199 S. W. 2nd 986, where the employee was killed in a fire in the cottage in which he lived on defendant's property. He was obliged to live there because as a maintenance man he was subject to call at any time. "Subject to call at any time" is the keynote of the case. But a waitress in restaurant who became disabled as a result of lesion made by physician in making required statutory blood test becoming infected, did not become disabled as a result of accident arising out of employment notwithstanding that employer, pursuant to his statutory duty, had ordered waitress to take the blood test.

This is by Supreme Court of Colorado. 181 Pacific 2nd 816, Ind. *Com. v. Messinger.* A volunteer fireman slipped on his kitchen floor as he was hurrying to respond to an alarm. In denying compensation the court said: "For an injury to be compensable there must be a causal connection between the employment and the injury.

It is not enough that because of the employment the employee was at a place other than one required by the employment where the injury occurred, where there is no causal connection between the injury and the employment;" *Henry v. Coleridge,* 24 N. W. 2nd 922. Nebr.

To And From Work

About one third of the appealed cases have to do with accidents occurring while going to or returning from work. An accident must arise out of the employment and occur in the course of the employment to be compensable in most States. In *Pearson v. Electric Service,* 201 Pacific 2nd 643, Nebraska, an employee who had charge of records was injured in an automobile accident in another State while riding to resume work upon such records and such records were with employee at the time of the accident, but the presence of records in car was not contributing factor to injury, and employer was not shown to have been negligent; the injuries were not compensable as arising out of and in the course of the employment. Where Telephone Company engaged Taxicab Company to transport daily employees to and from military fort where employees were working, switchboard operator who was injured through negligence of taxicab company had no claim for W. C. benefits since the cause of injury had no direct connection with "regular employment" and did not arise out of or necessarily follow as an incident thereof; this is a Montana decision, *Hoffman v. Johnston,* 181 Pacific 2nd 792. To the same effect is an Illinois decision, *Lyons v. Michigan Boulevard Building Co.,* 73 N. E. 2nd 776. A similar case with like holding is *Bobertz v. Board of Education,* (N. J.), 52 Atl. 2nd 827. An employee who was instructed to take his truck home after the day's work and park it there was not entitled to compensation under W. C. Act where on the way home he stopped at his girl's house and did not continue his way home until midnight because "he was not engaged in or about furtherance of the affairs or business of his employer within the meaning of the W. C. Act"; (Texas), *Owen v. Hardware Mutual,* 158 Federal 2nd 471. Illinois so held in a similar case: *Public Service v. Ind. Com.,* 69 N. E. 2nd 875. Wisconsin Act covers accidents growing out of employment or "incidental to employment" but it was held that a number of employees in riding to work in the car of another employee were not within the Act since they were not engaged in "employment" at the time; *Charney v. Ind. Com..* 23 N. W. 2nd 508. A schoolteacher suffering a highway accident had with her examination papers which she intended revising at home, but was not under the Act in the absence "of showing that teacher was engaged in performing a specific duty at School District's request;" *Murphy v. School District (Mich.),* 22 N. W. 2nd 280. An injury did not arise out of the employment though it occurred on the premises of employer, where the employee on his way home chose to take a shorter route across the premises and was struck by an engine; *Draper v. Railway Accessories, (Ky.)* 189 S. W. 2nd 934. Crossing the road to get coffee with the employer's permission and being fatally injured in a highway accident was not a case arising out of the employment; *Callahan v. Brown (Minn.)* 16 N. W. 2nd 317.

But COMPENSATION IS OWING where it was the custom of employer to take the men from his place of business to the job. The accident happened while the injured employee was riding in the car of another employee to the job. The theory was the work began at the place of business; (Florida), *Kennedy v. Fulghum,* 32 Southern 2nd 919.

Where it is arranged between employer and employee that the latter's work begins when he is picked up by employer's vehicle, with others, and his work ends when he is returned to his home, the hazards of the transportation as well as the hazards of the work are covered by the Act; if the employee should ask that the vehicle be stopped until he goes into a store to get tobacco and while on the way he is struck by another car, is his injury compensable? That was the situation in *Tinsman v. Sparks, Ark.* 201 S. W. 2nd 573. To thus stop for the convenience of the employees was permitted by the employer; the court determined there was no "such deviation from the employment as to remove Sparks from the protection of the W. C. law. In other words, whatever deviation there

might have been, was too slight to release the appellant from the coverage afforded Sparks as an employee." The court cited decisions from many States, and in running these down it is not found that any are exactly in point, but in *Younger v. Motor Camp,* 260 N. Y. 396, it is stated, and it is a keynote, "When, as in this case, some advantage to the employer, even though slight, can be discovered in the injured workman's conduct, his act cannot be regarded as purely personal and wholly unrelated to his employment. Under such circumstances his injury occurs not only in the course of his employment but it also arises out of it." There may be decisions to the contrary but it must be borne in mind that the decisions in the various states are not exactly uniform, and therefore a close examination of the decisions of the State in which the accident occurs is always important.

Arising out of the employment was quite thoroughly discussed in a North Carolina decision, *Rewis v. N. Y. Life Ins. Co.,* Supreme Court, 38 S. E. 2nd 97, where an employee had occasion to go to another building in the course of his work and while there was obliged to go to the men's room because of colitis; he became faint, called for help, went to the open window for air (as the Commission found), slipped on the tile floor, fell out of the window and was killed. The court said: "It is conceded that the subject case is without precedent in this jurisdiction. It poses a close question for decision. Authorities elsewhere may be found which seem to support either conclusion. It is thought that here the majority view would look with favor upon an award of compensation. However, the cases cited by the defendant from California, Kansas, Michigan and New York apparently point in the opposite direction." The majority of the court held compensation was owing for "at the time of the fall he was endeavoring to get himself into condition so as to be able to continue his employment. Such an act is regarded as an incident of the employment. Hence, there was a causal connection between the employment and the injury." One of the judges dissented on the theory that the death was attributable to and arose out of his serious physical condition. A comment would seem to be permissible; one comment could be that the accident did not arise out of the employment if he fell because of the disease but that it did arise out of the employment if he fell because of a "slippery floor." In such debatable instances the conclusion can best be reached only through careful study of the decisions in the State where compensation is claimed.

Another phase of this problem was discussed by the Supreme Court of Pennsylvania in *Hohman v. Soffel,* 46 Atlantic 2nd 475. There the employee was a general foreman and his work took him from place to place around Pittsburgh; he used his own car in which he carried tools and supplies and he also had at his home some tools and supplies; he commonly reported to his employer by telephone. On the day of the accident he had a job in a nearby town and on the way his car skidded and he had occasion to get out when he was then struck by a passing car. The court in holding for claimant said he was not on a "special mission" for the employer (as in a traveling salesman case) yet he was at the time "actually engaged in the furtherance of his employer's business and, therefore, entitled to compensation. It will be noted that in the special mission cases, employees claiming compensation had a regular place of work but were injured while temporarily away therefrom on an errand or mission for the benefit of the employer. . . . Here, however, the claimant had no regular place of work. His employment required him to be at one place one day on the employer's business and at a different place, perhaps miles distant, for like purpose on another or even a succeeding day. The service of the employer's interest in the circumstances shown necessarily made the claimant a 'roving' or 'itinerant' workman. The travel to and from the home and the place of his current work was not the ordinary travel of a workman between his home and his regular place of work. The claimant's travel, for which he was reimbursed by his employer, was an essential part of the expeditious performance of his work in the furtherance of the employer's business, as was also his transportation of the supplies which were stored at his home for his use in his work. Under the established facts of this case, his home rather than his employer's shop was the usual starting and stopping place of his course of employment."

An employee of the State of New York was injured on the sidewalk as she was coming back from her lunch. The sidewalk was part of the premises owned by the State and therefore she fell on her employer's property. The court held that where

one is injured on the property of the employer in going with reasonable dispatch and method to and from actual performance of specific duties of the employment and on a way provided by the employer or reasonably used by the employee, compensation must be awarded. It is a risk incidental to the employment. The case is *Manville v. N. Y. State Department of Labor,* 294 N. Y. 1, 59 N. E. 2nd 780. The same is true in Connecticut: *Carroll v. Westport Sanitarium,* 39 Atlantic 2nd 892; and *Ruckgaber v. Clark,* 39 Atlantic 2nd 881.

The Supreme Court of California in *Kobe v. Ind. Com.,* 215 Pacific 2nd 736, held that where employer paid employees specified amount to cover time required to travel to and from work warranted inference that employer had agreed that employment relationship should commence when employee left home and continue until his return so that perils of the journey could properly be regarded as hazards of employment.

A hostess employed in a hotel, while taking a bath and in endeavoring to answer telephone call while so doing, slipped in bath tub and was injured. Held she was in the course of her employment as it was her duty to respond to telephone calls at any time; *Neuman v. Shelburn Hotel (Fla.),* 20 Southern 2nd 677.

A truck driver was not entitled to compensation where he was using the truck at night on a personal pleasure trip and drove it several miles from any route he was required to take for business purposes; *Kirker v. McIntosh (Pa.),* 39 Atl. 2nd 846. And in Nebraska, *Simon v. Standard Oil,* 36 N. W. 102, the employee chose to go to a dangerous place where his employment did not necessarily carry him and he incurred danger of his own choosing altogether outside of any reasonable requirement of his position, and the court held that this was not an incident to his employment.

A most interesting decision by the Supreme Court of South Carolina, *Gory v. Monarch Mills,* 27 S. E. 2nd 291, is where "horseplay," friendly in character, was the causative thing through which the claim did not arise out of the employment. The claimant stopped his shoveling to ask an employee going by for a cigarette; he not having any, Davis came along immediately and he was asked for a cigarette but not having any playfully pushed the claimant so that he fell and broke his leg. The court held the injury grew out of "a matter totally disconnected with the work of the employer." Injuries sustained by truck driver who to accommodate helper had deviated from route prescribed by employer and had not returned thereto when truck collided with another truck did not arise out of the employment; *Grimes v. Janney (Va.),* 32 S. E. 2nd 6.

Injuries through play do not arise out of employment; see *Hill v. Liberty Motor (Md.),* 45 Atlantic 2nd 467, where, in room provided by employer for employees to change their clothes, rough play resulting in an accident was not covered by the W. C. Act; a similar case is in New Jersey, *Budrezie v. Wright,* 45 Atlantic 2nd 453. But where two employees met each other in a narrow passageway and one placed his hands on the shoulder of the other as a friendly gesture in passing, the resulting injury did arise out of the employment; *Brown v. Carolina Aluminum Co. (No. Car.)* 32 S. E. 2nd 320.

Assault

An employee traveling from town to town and stopping at a restaurant for a meal was assaulted by a person who was either crazy, drunk or otherwise irresponsible. Held it was not a hazard of traveling and therefore not compensable; *Thornton v. R. C. A. Service Co.* (Tenn. Supreme Court), 221 S. W. 2nd 954. A quarrel over a matter not relating to the business is excluded from the Act; *Sanders v. Jarka (N. J.),* 59 Atl. 2nd 415. Likewise are *Taylor v. Town of Wake Forrest (No. Car.)* 45 S. E. 2nd 387, and *Container Co. v. Ind. Com. (Ill.),* 81 N. E. 2nd 571; another in Illinois, *Igler v. Ind. Com.,* 68 N. E. 2nd 773; still another in Maryland, *Rice v. Revere,* 48 Atl. 2nd 166; plus a New Jersey decision, *Giles v. W. M. Beverage Co.,* 43 Atl. 2nd 286.

But compensation was owing in *Casualty Ex. v. Johnson (Tex.)* 148 Federal 2nd 228, where night engineer in charge of out-lying ice plant, knowing nothing of race riot in downtown area, was walking from his place of work to the loading platform to get a drink of water or give orders to his helper when shot by unknown assailant who drove onto the premises in automobile as customers were invited to do, the riot having increased the hazard of working. And so did the accident arise out of the employment in North Carolina, *Hetler v. Cannon,* 31 N. E. 2nd 918 where the quarrel arose out of the criticism by the person injured of another man's work.

Lunch

Injury sustained by employee on employer's premises during lunch period when struck by a batted ball while watching other employees playing baseball was not compensable injury arising out of employment notwithstanding that employer permitted the playing of baseball at that time and place; it did not arise out of the "employment;" *Luteran v. Ford,* Mich. 21 N. W. 2nd 825. See also *Eagle v. Ind. Com.* by the Supreme Court of Ohio in 63 N. E. 2nd 439. Compensation was not owing in Florida, *Heller v. Kendricks,* 20 Southern 2nd 387, where without direction from foreman two employees took the employer's truck to drive to a nearby town in order to get lunch. Held it was a private mission not connected with the employment. But where the employer permitted smoking in the Service Room during the designated rest period one who suffered an injury from burning from the match of another, was injured in the course of her employment. One of the judges dissented believing the question was ruled by *Mann v. Glastonbury* (*Conn.*) 96 Atlantic 368, holding in similar circumstances to the contrary; the decision is *Puffin v. General Electric* (*Conn.*), 43 Atlantic 2nd 746. Accident in Arizona, *Goodyear v. Ind. Com.,* 158 Pacific 2nd 511, where a guard was required to eat his lunch on the premises and was injured when bottle of Coca-Cola, which was part of his lunch, exploded as he was about to put it in a cooler was within the Compensation Act. Going to a nearby town to get lunch at the employer's direction and using the employer's truck and while on the way the accident occurred, it arose out of the employment since the work contracted to be done included the trip to town for lunch; the case is *Heller v. Lewis* (*Fla.*), 20 Southern 2nd 385. Note the difference between this decision and that in the Kendricks case above cited.

Parking Lot

A workman is not entitled to compensation for a disability resulting from fall on ice and snow on a parking lot provided by his employer when the condition there is the same as prevails generally throughout the community and has been caused by a storm during the preceding day and night; *Walborn v. General Fireproofing Company,* by the Supreme Court of Ohio in 72 N. E. 95. Nor is compensation owing where employee drove his motorcycle out of its parking place and through the plant grounds which provided a shorter route home; *Schank v. Martin* (*Nev.*), 23 N. W. 2nd 557. But in a late decision, *Finley v. St. Louis Smelting,* 227 S. W. 2nd 747, (Mo.), an employee was entitled to compensation on the theory that inasmuch as the employee had to come six miles to work and that the employer provided a place for his car and that the employee was permitted to leave his work 15 minutes earlier so as to be able to start from the plant at quitting time, an injury suffered by him in getting his car started did arise out of the employment. There was a dissenting opinion but the Supreme Court denied an appeal. Where employer installed parking lot for mutual benefit of itself and employees and placed traffic officer in highway to provide for a safe crossing of employees to lot, injuries sustained by employee while crossing highway to go to lot arose out of the employment; *McCrea v. Eastern Aircraft* (*N. J.*), 59 Atl. 2nd 376.

Risks Common to Public

Where in cold weather the employer has provided places so employees who are exposed to the weather can warm themselves, frost-bitten feet are not within the Act. The Supreme Court of Illinois held that the result was not an accident within the meaning of the Act nor did it arise from the employment; *Ceisel v. Ind. Com.,* 81 N. E. 506. And that same court held in *Cummings v. Ind. Com.,* 59 N. E. 2nd 872, that an accidental injury to the eye as a result of foreign particles being blown into the eye by a draft from the outside while claimant having entered place of employment was closing outside door, did not arise out of the employment for it was a risk to which the public generally was exposed. "The conclusion is inescapable that the accident to Soile's eye had its origin in the action of the air outside the building and that it did not arise out of a risk connected with the employment. It was a risk to which the public generally was exposed; the fact that an accident happened on the employer's premises is not sufficient. It must be shown that the accident had its origin in some risk connected with or incident to the employment so that there is some causal relationship between the employment and the injury."

Airplane Tort Law

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LIABILITY for tort growing out of the use of the airplane sounds as though it would be only of academic interest to the average lawyer. This, of course, is because aviation is comparatively new. But this new industry is making great strides. There are now over 100,000 airplanes registered in the United States. Only a few years ago our airlines were struggling to pass the 1,000,000 passenger mark. Our airlines carried some 18,828,000 revenue passengers last year.[1] True, they have established such a wonderful safety record over the past several years that only a fraction over one passenger was fatally injured in each 100,000,000 passenger miles of flight —making airline safety far greater than driving from office to home in automobile or taxi.[2] But even with such safety, there are bound to be some accidents. And accidents produce both claims and law suits. For instance, my office—representing only one of several aviation insurers—supervised the handling of some 2,000 aviation tort claims in 1950 and had 217 suits in the U. S. A. involving aeronautical torts on our suit register at the end of last year. So the subject has in fact grown considerably beyond purely academic interest.

Since the aeronautical operations we insure reach around the globe, I can not attend most trials and use adjusters and attorneys I have never met to handle claims and law suits. The principal difficulty I encounter is the fact that most lawyers have not had aviation practice, therefore, know nothing of aviation law or of aviation. We all fear the unknown. In my office I solved this difficulty by building a staff of lawyers who are also aviators. We specialize in aviation and aviation law in order to supply the only gap in the equipment of the otherwise competent local attorney. In the hope of contributing something of practical value to the practicing lawyer, I shall try, within the limited space at my disposal, to accomplish somewhat the same result in this paper—so far as the law is concerned.

[1]Jan. 20, 1951 CAA Journal.
[2]National Safety Council.

Aviation Subject to Common Law Rules of Negligence

The comforting thing to the lawyer is that there is really little aviation law, in the sense of law peculiar to aviation. Tort liability has been tinkered with little as yet in connection with aviation and the common law rules of negligence – with which every lawyer is familiar—generally apply. There is a considerable body of law built up by our courts applying these principles, but an adequate discussion of such cases cannot be included in a general paper of this character. Although there have been comparatively few "reported cases" there have been many decisions, charges and opinions by lower courts which indicate the trend in the law. A comprehensive compilation of most decisions and other pertinent material is found in U. S. Aviation Reports[3] and the Commerce Clearing House publishes a very comprehensive service called Aviation Law Report.[4]. The idea I wish to convey is that aviation law is not a special branch but an application of the general law with which we are all familiar and quite as accessible as the law relating to any other industry.

There are three exceptions to this: (1) Land Damage Statutes, (2) Guest Statutes, and (3) The international treaty covering liability to passengers, baggage and cargo in international flight known as the Warsaw Convention. These will be discussed later. Let us first take a look at the way our courts have applied the well established doctrines of the common law to a new and revolutionary technological development such as aviation or have modified those rules in a perfect example of the adaptability and flexibility of our wonderful and unique common law system.

Cujus Est Solum Modified to Permit Flying

The very first hurdle, of course, was the old common law doctrine of *cujus est solum*

[3]U. S. Aviation Reports, Inc., 2301 N. Charles St., Baltimore 18, Md.
[4]Commerce Clearing House, Inc., 214 N. Michigan Ave., Chicago 1, Ill.

ejus usque ad coelum—whose is the soil, his it is up to the sky.[6] Literally applied, there could have been no flight without trespass. There are many decisions on the subject, but the U. S. Supreme Court in *U. S. v. Causby*[6] pretty well sums them up, holding that the above doctrine has no place in the modern world. The air is a public highway and the air space, apart from the immediate reaches above the land, is a part of the public domain. However, the rights of the land owner are fully protected as this court (and many other courts) held that the land owner owns at least as much of the space above the ground as he can occupy or use in connection with the land. Invasions of air space are in the same category as invasions of the surface.

Air Carrier Liability Same As Any Common Carrier

The principle that a common carrier is not the insurer of its passengers' safety is applied to airlines. For instance, in *Allison v. Standard Airlines*[7] the court held that "the carrier is not an insurer of the safety of its passengers and is not bound absolutely and at all events to carry them safely." The operator not in the common carrier class likewise is held to the same degree of care as the non carrier operator of a vehicle on the surface.

The airline, like other common carriers, is held to the highest degree of care, but this "highest degree" must be interpreted as that consistent with the operation of an airline. For instance, in *Law v. TWA*[8] there is a good discussion of this problem. In *Foot v. Northwest Airlines*[9] the court says: "It was the duty of the defendant to exercise the highest degree of care for the safety of the passengers . . . consistent with the practical operation of the plane itself. . . . We are not to hold people to the impossible."

The airline, of course, is not responsible if the injury occurred from an "Act of God." In *Thomas v. American Airways,*[10] for instance, the court charged the jury: "If you believe . . . that the accident happened without fault or negligence . . . or as a result of an Act of God, then it is your duty . . . to return your verdict in favor of the defendant." This principle is still applied as we have, in May, 1951, had a verdict for the defendant affirmed by the U. S. Court of Appeals for the Third Circuit[11] in the case in which the Executrix of the notorious Earl Carroll sued for $2,000,000 damages resulting from an accident in Pennsylvania.

The principle that a passenger must assume the risk of the mode of conveyance he chooses is applied to aircraft.[12] This principle is well stated in the early case of *L & WR Co. v. Crumpler*[13] . . . but there are some casualties which human sagacity could not guard against and foresee, and that every passenger must make up his mind to meet the risks incident to the mode of travel which he adopts, that cannot be avoided by the highest degree of care and skill in the preparation and management of the means of conveyance."

The principle that a person is not to be held strictly accountable for decisions made in an emergency has been applied in aviation cases. For instance, in *Thomas v. American,* supra, the court said: "One who, without negligence on his own part, is suddenly confronted with imminent danger, is not required to exercise that degree of care and skill which would be required after a calm review of the facts after an accident occurred."

Res Ipsa Loquitur As Applied to Aviation

The application of *res ipsa loquitur* to aviation cases, as to any other type cases, is not consistent in the various states. Most of our courts have recognized and applied the doctrine under certain circumstances, but the conditions under which the courts will apply the doctrine and the method of application vary almost in proportion to the number of jurisdictions.[14] South Carolina courts have repudiated the doctrine but have managed to reach about the same results. The subject is briefly included, nevertheless, as a rather necessary element of tort law.

The phrase, *res ipsa loquitur,* translated literally, means that the thing or affair speaks for itself. It is merely a short way of saying that the circumstances attending the accident are such as to justify the con-

[6] 9 Coke, 54.
[6] 328 U.S. 256.
[7] 1930 USAvR 292.
[8] 1931 USAvR 205.
[9] 1931 USAvR 60.
[10] 1935 USAvR 102.
[11] *Schuyler Ex'x. v. United Airlines.*
[12] *Allison v. Standard Airlines,* supra; *Kimmel v. Pennsylvania Airlines,* 1937 *USAvR* 104; *Hope v. United Airlines,* 1937 USAvR 179; *Law v. Transcontinental Airlines,* supra.
[13] 122 Fed. 425.
[14] Wigmore, Vol. IX, Sec. 2509.

clusion that the accident was caused by negligence. The inference of negligence is deducible, not from the mere happening of the accident, but from the attendant circumstances.[15]

The doctrine is not an arbitrary rule "but rather a common sense appraisal of the probative value of circumstantial evidence. It is a rule of reasonable inferences.[16] So, where a plaintiff introduces evidence showing at least the probability that a particular accident could not have occurred without negligence of the defendant, an inference of negligence is shown.[17] However, the inference of negligence must be the only one that can fairly and reasonably be drawn from the attendant circumstances to permit the application of *res ipsa loquitur*.[18]

Effect of Res Ipsa Loquitur

The law requires a plaintiff to establish the negligence of a person from whom he seeks damages, and it must be established by a preponderance of the evidence.[19] We thus say the plaintiff has the burden of proof or the burden of proving the defendant's negligence. Let us see then in what way *res ipsa* eases the plaintiff's burden of proof.

We know that "practically all courts now recognize the distinction between the burden of producing evidence—that is, the risk of non-production of sufficient evidence to justify a finding—and the burden of persuasion—that is, the risk of failing to persuade the trier to make that finding —though many still use the term, burden of proof, to cover both concepts."[20] This division of the burden of proof may also be labeled the burden of going forward with the evidence (to avoid a non-suit), and the burden of persuasion (to convince the jury and get a verdict). We then ask: Does *res ipsa* satisfy the burden of persuasion or merely the burden of going forward with the evidence?

The majority view is that *res ipsa loquitur* does not establish a presumption of negligence, but merely raises an inference of negligence sufficient to establish a *prima facie* case and carry the case to the jury.[21] Thus, it merely aids the plaintiff by carrying the burden of going forward with the evidence, and the plaintiff still must carry the burden of persuasion to get a verdict.[21a]

Too many lawyers have made the mistake of assuming that this doctrine will be applied to all aviation cases, therefore, that a situation approximating presumed liability exists with respect to aviation accidents. Nothing could be further from the truth.

Difference Between Res Ipsa and Presumed Liability

There are three major differences between *res ipsa loquitur* and presumed liability:

First, the courts recognize *res ipsa loquitur* as an exception to the common law rule that a plaintiff must prove defendant's fault and as such, they require the plaintiff to justify the use of the doctrine by showing the aircraft was in the exclusive control of the defendant, freedom from contributory negligence, and that such accidents do not ordinarily occur without negligence. Many courts have refused to apply *res ipsa loquitur* in aviation passenger claims because the plaintiff failed to justify its application. The plaintiff is faced with no such problem where liability is presumed.

Second, *res ipsa loquitur* is only a rule of evidence which, according to most courts, creates a mere inference of negligence and the burden of proving negligence by a preponderance of the evidence remains with the plaintiff. However, if presumed liability were in fact imposed by the doctrine, the burden of proving freedom of fault, by a preponderance of evidence, would be squarely placed upon the defendant. In other words, *res ipsa loquitur* merely aids a plaintiff in proving negli-

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[15]Jacobs, *EVIDENCE IN NEGLIGENCE CASES*, 75.

[16]1 *SHEARMAN AND REDFIELD, NEGLIGENCE*, Sec. 56 (Zipp's ed. 1941); see *Galbraith v. Busch*, 267 N.Y. 230, 234, 196 N.E. 36, 38 (1935).

[17]See *Loebig's Guardian v. Coca Cola Bottling Co.*; 259 Ky. 124, 126, 81 S.W. 2d 910, 911 (1935); *Galbraith v. Busch*, supra note 16, at 234, 196 N.E. at 38.

[18]*Jenson v. Kress & Co.*; 87 Utah 434, 49 P. 2d 958 (1935); *Francey v. Rutland Ry.*, 222 N.Y. 482, 119 N.E. 86 (1918); 1 *SHEARMAN AND REDFIELD*, cit. supra note 16 Sec. 56.

[19]65 C.J.S. 995 (1950).

[20]Morgan *EVIDENCE* 10 (Practicing Law Institute 1946).

[21]*SHAIN, RES IPSA LOQUITUR, PRESUMPTIONS AND BURDEN OF PROOF* (2d ed. 1947); Bohlen, The Effect of Rebuttal Presumptions of Law Upon the Burden of Proof, 68 U. of Pa. L. Rev. 307 (1920); Reaugh, Presumptions and Burden of Proof, 36 Ill. L. Rev. 703 (1942); 10 Am. Jur. 374 (1937); 38 Am. Jur. 1008 (1941); 65 C.J.S. 1021 (1950);*Nebel v. Burrelli*, 41 A (2d) 873.

[21a]a. McLarty, Va. Law Review, Jan. 1951, 55.

gence, but if liability is accepted as presumed, the plaintiff would be freed from proving anything and all of the burden would be placed squarely on the defendant.

Finally, the ultimate effect of the two doctrines—*res ipsa loquitur* and presumed liability—is quite different. In almost every aviation passenger case in which *res ipsa* has been invoked, the court or jury has found a verdict for the defendant, whereas incidents are rare, indeed, in which a defendant's verdict is reached when presumed liability is imposed. For instance, in only one case under the Warsaw Convention, which imposes presumed liability,[22] has a U. S. A. court or jury found for the defendant. As in all other types of tort cases, there is no magic formula by which a case can be won—either for plaintiff or defendant. There is no substitute for careful preparation.

Evidence in Accidents Where All Aboard Are Killed

This suggests the well known query as to how negligence can be proven in an airplane accident which occurs in a remote section where there are few eye witnesses, if any, and everyone on the plane is killed. This presents an unsurmountable problem to the theorist, but to those with experience in such matters, it presents no problem at all. Let's take an actual airline catastrophe which occurred on an airline my office represented but for which all claims are now settled and, therefore, discussion is permissible. On a regularly scheduled trip of a certificated airline, a DC-3 airliner crashed into a mountain some fifty miles from its scheduled destination, instantly killing all on board—both passengers and crew—and the country in which the crash occurred was so wild that there was not a single witness to the accident or the flight before the accident occurred. It took days to find the wreck and when found, it was almost completely demolished by impact and fire.

This is the type of accident that the theoretical lawyer feels is hopeless, either as to proving negligence or defending a suit in which the doctrine of *res ipsa loquitur* is applied. Such a conclusion is completely unjustified. The fact is that volumes of factual evidence was available in that case as is usually true in any airline catastrophe. The reason is that more complete records are kept in airline operation than perhaps in any industry. There are complete records of past performance of the aircraft and engines. There is a complete record of all inspections, repairs and overhauls. There is a complete record of the training and experience as well as the physical condition of the crew. There is a complete record of the loading and dispatching of the aircraft, of the weather before and after the flight was dispatched, with the plan of flight and all radio conversations during airport control and en route. There is a complete record of the examination of the accident site and of the wreckage by experts. Furthermore, an exhaustive public investigation—with both the hearing and a transcript of the testimony available to plaintiff and defendant alike—brings out all technical and eye witness evidence far better than any private investigation, since the CAB has the power of subpoena. In what other industry is so much done for the claimant and his attorney?

In the illustration mentioned, the Civil Aeronautics Board published the following findings as to the facts and the probable cause:[23]

"1. The air carrier, the aircraft and the crew were properly certificated.

2. There was no failure or malfunctioning of the aircraft, engines or radio disclosed in the investigation. Power was being developed by both engines on impact.

3. The flight experienced light to moderate turbulence.

4. All radio range and air navigational facilities were operating normally with the exception of the Newhall radio range station which was inoperative.

5. Although the Newhall radio range was inoperative, adequate radio facilities were available for instrument flight from Las Vegas to Burbank.

6. Although the flight had reported no difficulty up to the time of the last radio contact at 0337, static conditions and transmissions of other flights on the company radio frequency made the communications of Flight 23 difficult.

7. The flight time from 0320 until 0337, was a period of an unusual

[22] *Ritts v. American Overseas Airlines,* 1949 USAvR 65.

[23] Docket No. SA-131, File No. 5413-46.

amount of radio communication.

8. The winds in the mountainous area were higher than forecast at the altitude at which the flight was conducted.
9. Other flights had been able to navigate safely through and about the area of the scene of the accident.
10. The position report 'over Newhall' was in error.
11. The let-down was started without a positive check on the position.
12. The scene of the accident is located 27 miles northwest of the intersection of the southwest leg of the Palmdale radio range and northwest leg of the Los Angeles radio range and 10 miles to the right of the radio range leg on which initial approach letdown was to be made.
13. The aircraft was on an approximate heading of 155 degrees at the moment of impact."

"Probable Cause:

"The Board determines that the probable cause of this accident was the action of the pilot in making an instrument letdown without previously establishing a positive radio fix. This action was aggravated by conditions of severe static, wind in excess of anticipated velocities, preoccupation with an unusual amount of radio conversation, and the inoperative Newhall radio range."

The amount of evidence available is usually limited only by the zeal and intelligence of the lawyer. Of course some of our brethren do not want to have to use either zeal or intelligence. They do not want both parties to have a fair hearing as provided by our established law. They want liability arbitrarily imposed on the airline—or at least presumed against the airline—so that all they have to do is thumb a code, like looking up a telephone number, to find out what is due and go collect. Fortunately, there have been enough thoughtful lawyers, who respect the struggle during past centuries in developing the protection of our present system, to block the attempted radical departures from established law.

Federal v. State Control of Tort Remedy

Another unjustified conclusion of the uninitiated or of the legal reformer is that the airplane is inherently interstate in character and, therefore, should have interstate or federal regulation as to tort. The standard illustration is that a New York-Washington, D. C. plane flies over six jurisdictions in a matter of minutes: New York, New Jersey, Pennsylvania, Delaware, Maryland and the District of Columbia. Of course, this is quite true. Its truth has been recognized by the passage of the Civil Aeronautics Act of 1938[24] which provides uniform safety and economic regulation, but the conclusion that tort liability regulation is also indicated is completely unjustified. For the federal government to usurp such authority would be an unwarranted invasion of the right of each sovereign state to control the remedy for tort committed within its border. While there is somewhat different law in the different U. S. A. jurisdictions, there has been no conflict and the applicable law is conveniently available to anyone with access to a law library anywhere in the United States. It is well established that the applicable law is that of the place where the "force impinged" causing the injury[25] the *lex loci delictus*. To set the airplane apart for a different standard of liability from competing forms of surface transportation is not only a grave injustice to a new and struggling industry, but is an unwarranted invasion of the right of each state to control the happenings within its borders. The states have very different ideas and this is inherent under the theory of our Union. New York, like several other states[26] has a constitutional prohibition against limiting the sum recoverable as damages for wrongful death, whereas the state next door, Connecticut, like many other states,[27] chooses to limit such recovery. Of course, the mere fact that an airplane crosses state boundaries faster does not make it any more interstate in character than the railroads, buses, truck lines, etc.

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[24] 49 U.S. Code 401.

[25] 1943 USAvR 1, 293 N.Y. 878, Beal Conflict of Law—Vol. 2, 129.

[26] Constitutions of Arizona, Ark., Ky.; N.Y.; Ohio, Okla.; Penna.; Utah & Wyo. prohibit limiting recovery for wrongful death. Ariz., Ark., Ky., Penna.; and Wyo. also prohibit any limitation upon recovery for bodily injury or damage to property.

[27] Alaska, $15,000; Col. $10,000; Conn. $20,000; Ill. $20,000; Ind. $15,000; Kansas $15,000; Maine $10,000; Mass. $15,000; Minn. $17,500 as of April 24, 1951. Missouri $15,000; N. Hampshire $15,000; Oregon $15,000; S.D. $10,000; Va. $15,000; W. Va. $10,000; Wisconsin $15,000. For common carriers only, New Mexico $10,000.

Common Law Has Adapted Itself to Aviation Readily

As a matter of fact, our courts have found no difficulty in adapting the common law to aviation tort liability, as reported to the New York State Bar Association by its Committee on Aeronautical Law in 1942, when the writer was not a member of that Committee. That Committee found, after an examination of all available authority, that the courts had found no additional law necessary to do substantial justice to the public and all concerned. That conclusion was confirmed in 1950, when the writer was Chairman of said Committee.

The final conclusion justified is that our presently established common law, without the intervention of theoretical reformers or of special statutes, is best able to handle aviation cases just as it does other types of cases, with greatest justice to all parties concerned. The average lawyer will find that he can competently and with confidence prosecute an aviation case on the basis of the law he already knows—much the same principles taught when I graduated from the University of South Carolina School of Law in 1910.

The Civil Aeronautics Authority and Its Regulations

There is often some confusion as to (1) just what the Civil Aeronautics Authority is, and (2) as to the effect of the Civil Air Regulations issued by that federal Authority on aviation liability.

(1) The Civil Aeronautics Authority was created by the Civil Aeronautics Act of 1938. Under the Reorganization Act of 1939 the President reorganized the Authority and Public Resolution 75, approved June 4, 1940, provides that Reorganization Plans No. III and IV shall take effect on June 30, 1940. Briefly, the Civil Aeronautics Authority was divided into two organizations, one being the Civil Aeronautics Board, which, among other things, issues civil air regulations and investigates accidents through its Safety Bureau, and the other, the Civil Aeronautics Administrator, who, among other things, is the administrative agency to carry out the regulations of the Board. The term Civil Aeronautics Authority is now used only in referring generally to the whole federal control of aeronautical affairs.

(2) There is presently no federal law (other than the Warsaw Convention) having to do with aviation liability to passengers, goods or the public. Section 701 (e) of the 1938 Act, supra, specifically provided that no part of any report or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports. This is only fair, as this agency has nothing to do with determining liability, its investigations are for a totally different purpose—safety regulation—it receives inadmissible evidence without regard to the safeguards of law and its conclusions which may be interpreted as affecting liability are often unsustainable by legal evidence.

About the only way the civil air regulations of the CAB would affect liability is that compliance with or violation of regulations might be submitted as evidence, if material, in legally determining liability. In other words, violation of Civil Air Regulations and of local flight rules are not necessarily negligence *per se*, but may be considered by the jury as evidence of negligence when the violation is the proximate and contributing cause of the accident.[28]

Statutory Exceptions to Common Law Rules

I mentioned above three exceptions to the application of the common law rules of liability respecting airplane tort liability:

(1) Land Damage Statutes; (2) Guest Statutes; (3) The Warsaw Convention.

Land Damage Statutes

(1) Land Damage laws in a few states impose absolute and unlimited liability on the owner (and certain liability on the operator) for property damage and/or injury to innocent third parties on the surface caused by the operation of aircraft or objects falling therefrom. This appeared as Section 5 of a model form known as the Uniform State Law for Aeronautics promulgated to the states about 1922 before there was any commercial aviation or any experience from aeronautical operations and while the airplane was an object of fear and distrust within the definition of a dangerous instrumentality. Of course, as soon as there was enough experience with aviation to judge as to its dangers, our courts promptly and almost universally held the airplane not to be a dangerous instrumentality but in the meantime, mostly in the nineteen twenties, almost half

[28] *Braman v. Thomson,* 139 USAvR 142, 3 NYS 2d 602.

the states had passed this model bill. Most of them—including South Carolina—included the antiquated and ill-conceived Section 5.

I describe this absolute liability provision as antiquated because, as explained above, the airplane has proven itself not to be a dangerous instrumentality and there is no justification for imposing upon it a different standard of liability than that applicable to other forms of transportation. I describe it as ill-conceived because the absolute and unlimited liability imposed upon the aircraft owner—regardless of fault or his ability to prove that the injury or damage was not caused of his own lack of care—is a definite detriment to aviation and opposed to our precepts of justice to all parties concerned. With such rigid liability absolutely imposed upon him, the aircraft owner who really understands the situation would not dare own an airplane without insurance for fantastically high limits of liability.

If there was any real need for this drastic treatment, there might be some justification for it. However, such legislation is entirely unnecessary for the protection of the public as I have been unable to find one single instance where any court in states not having this legislation has failed to give adequate relief to innocent third parties on the surface.[29] This is so thoroughly recognized that the states which originally incorporated Section 5 into their law have been constantly repealing this Section until by the end of 1950, there remain only ten jurisdictions that retain the absolute liability provision: Delaware, Hawaii, Minnesota, New Jersey, North Dakota, South Carolina, Tennessee, Vermont, Montana and Wyoming. Two methods have been used to repeal this law, one illustrated by the action of South Dakota in 1949 that provides liability for such tort in accordance with the rules of law applicable to torts in that state, and another, like the Maryland law, which imposes presumed liability upon the owner —making proof of damage *prima facie* evidence of liability—but permitting the aircraft owner the opportunity of rebutting this presumption. Georgia, Maryland, Nevada, and Wisconsin now have such laws.

Several legislatures have repealing laws before them during 1951 but a record of final action is not yet available. Vermont obviously attempted to void the absolute liability provision of its law this year by deleting the word "absolutely" and "whether such owner was negligent or not" from the provisions creating liability on the owner of an aircraft for damage or injury on the surface," but whether this was successful is doubtful since the law still declares the owner liable and only the defense of contributory negligence is provided. I am hopeful that South Carolina will soon correct its law—which I believe is Sec. 7104 in the South Carolina Code—preferably by substituting the text of the South Dakota 1949 amendment. This law is suggested as it not only corrects the liability so that the airplane operator is placed on equal terms with other forms of transportation but also provides for exempting the equity owner to assist in financing the purchase of airplanes. At present, the only relief given the equity owner against these absolute liability laws is the attempt of the 80th Congress in passing Public Law 656, Sec. 504 of the Civil Aeronautics Act of 1938[30] as amended.

Guest Statutes

(2) Guest Statutes applicable to the aircraft have been passed by a few states, notably South Carolina, California and Indiana. Motor vehicle laws have been generally held inapplicable to aviation and so the guest statutes in such laws would naturally not apply. The Indiana law predicates liability only upon proof of wanton or wilful misconduct and the California statute likewise limits liability definitely but the South Carolina statute appears rather indefinite since it predicates liability on intention on the part of the owner or operator or his "heedlessness."[31] Just what a jury would consider "heedlessness" seems problematical. The tendency appears to be to make guest statutes now applicable to automobiles also applicable to aviation, since several such bills are in legislatures this year.

Warsaw Convention

(3) The third exception affecting airplane tort liability is an international "Convention for the Unification of Certain Rules Relating to International Transportation by Air," commonly called the Warsaw Convention.[32] This treaty was adhered to by the U. S. A. in 1934 and is in effect

[29] *Guille v. Swan*, 1928 USAvR 53; *Rochester v. Dunlap*, 1933 USAvR 511; *Livingston v. Flaherty*, 4 J. Air Law 515; *Pentz v. Rex*, 1936 USAvR 294; *Kirschner v. Jones*, 1932 USAvR 278; *Sollak v. State of N.Y.*, 1929 USAvR 42.

[30] 49 U.S. Code 401.

[31] Sec. 5908, 1936 Supp.

in most of the nations in Europe, Canada and Mexico in North America and only Brazil (with the exception of European dependencies) in Central and South America.[32a]

Its application is determined[33] by the contract of transportation and not by the place of accident—when between two nations adhering to the treaty, or from one adhering nation to a destination in that same nation, if there has been an agreed stopping place in another nation whether an adherent or not. It places presumed liability on the carrier for injury to passengers,[34] baggage and/or goods[35] unless the carrier can affirmatively prove that it and its agents have taken all necessary measures to avoid the damage[36] (or in the case of baggage and goods, that the damage was caused by an error in piloting or navigation,[37]) and limits recovery: for death or injury of passengers[38] to the present U. S. currency value of $8,291.87; baggage and goods[39] to $16.58 per kilogram (2.2046 lbs.); and $331.67 for objects of which the passenger takes charge himself,[40] unless the passenger affirmatively proves that the damage was caused by wilful misconduct,[41] in which case there would be no limit. The limitation for bringing an action is two years.[42]

Our international air commerce is developing rapidly and this development will continue until it becomes of importance to an ever increasing number of lawyers. As a matter of fact, the subject is not as remote in practical interest as appears on the surface, as many lawyers who do not consider their practice in the field of international law at all are being confronted with the problems growing out of international air transportation—and finding that quite different principles of law are involved. This, of course, is in those cases to which the so-called Warsaw Convention is applicable—and it can be applicable in the most surprising places, for instance, on a purely intrastate flight, let us say, from Greenville to Charleston.[43]

There have been several decisions of interest in connection with the Warsaw Convention but I am afraid there is time to discuss only one.

The Leading U. S. A. Warsaw Convention Case

The case of *Wyman v. Pan American*[44] was concluded in 1945. This case involved the death of a passenger in 1938 on a passage contract from San Francisco (USA) to Hong Kong (a British colony), both adherents to the Warsaw Convention. The trip required several days with overnight stop-overs at a number of points, all under U. S. sovereignty and the accident occurred on the leg of the flight between Guam and Manila, both under U. S. Sovereignty at that time. In other words, the plane had never entered foreign territory and the intended immediate destination, Manila, was still under U. S. A. jurisdiction. Further, the plane disappeared over the no-man's land of the high seas, so the accident or whatever caused the failure to reach port, was assumed to have occurred over the high seas. The many interesting legal questions arising in such circumstances are immediately apparent. The case was tried in the New York State Supreme Court, New York County in June 1943, the decision being that the flight was subject to the Warsaw Convention and that recovery was limited to the U. S. equivalent of the limit provided therein. The decision was unanimously affirmed without opinion by the Appellate Division[45] and again unanimously affirmed without opinion by the New York Court of Appeals.[46] Certiorari was denied by the United States Supreme Court, April 23rd, 1945.[47]

Since this is the first case involving the Warsaw Convention which has been considered by the highest state and federal tribunals, it will probably be classed as the leading American case. In view of the many legal questions so ably presented by counsel for both sides on the several appeals, it is regrettable that we have no opinions from the higher courts. However, Judge Schreiber's decision, so authoritatively confirmed, settled several important

[32]49 Stat. 300 (1934); available from Supt. of Doc., Washington 25, D.C. as Treaty Series No. 876, at 10 cents.
[32a]. 1950 USAvR Blue Pages.
[33]Ch. I, Art. 1, (2).
[34]Ch. III, Art. 17.
[35]Ch. III, Art. 18.
[36]Ch. III, Art. 20 (1).
[37]Ch. III, Art. 20 (2).
[38]Ch. III, Art. 22 (1).
[39]Ch. III Art. 22 (2).
[40]Ch. III, Art. 22 (3); The U.S. cy. value of the gold franc is presently fixed at $0.066335.
[41]Ch. III, Art. 25.
[42]Ch. III, Art. 29.

[43]Orr, March, 1945 Va. Law Review, p. 423.
[44]1943 USAvR 1; 181 Mis. 963; 43 N.Y.S. (2d) 420, 293 N.Y. 878.
[45]267 App. Div. 947; 48 N.Y.S. (2d) 459.
[46]293 N.Y. 878; 59 N.E. (2d) 785; 1943 USAvR 1.
[47]324 U.S.—No. 1 (advance sheets), page V. Leading British case *Grein v. Imperial Airways;* 1936 USAvR 184.

points: (1) the rights of the parties are fixed by the Warsaw Convention. (2) The Convention becomes a part of the law of the land. (3) The rules of the Convention were made a condition of the ticket, (4) and in any event are so made by the Convention rules themselves. (5) Warsaw Convention rules are applicable only to international flights (Art. 1) and (6) raise a presumption of liability on the part of the carrier (7) for injury or death of a passenger (8) limited to approximately $8,300 under present U. S. Gold standard, except where the carrier is guilty of "wilful misconduct." (9) There was no proof of wilful misconduct, indeed of any negligence connected with or a proximate cause of the accident (establishing that affirmative proof is necessary). (10) The Warsaw Convention rules permit a recovery that otherwise might be impossible for want of proof. (11) The original place of departure and the final destination is specifically controlling despite breaks in travel routes. (12) Compliance with the law (by the carrier) is always to be assumed unless the contrary is proven. (13) The right to bring a death action is purely statutory. It did not exist at common law, and depends upon the existence of the statute creating a right of action at the place where the "force impinged" causing the injuries. (14) No new substantive rights were created by the Warsaw Convention and all its rules are well within the framework of existing legal rights and remedies. (15) The right to recover must depend upon some statute. (16) The New York Law can have no application as the injury and death did not occur within the state. (17) The federal "Death on the High Seas Act"[48] is applicable to airplane accidents on the high seas. (18) As interest is not provided in that Act, no interest may be allowed on verdict.

Airline Tariffs Filed With CAB

While perhaps not strictly tort law, the tariff rules and regulations filed with the CAB in Washington and available in all airline ticket offices, may have very definite effect on both tort cases and claims for loss or damage to baggage and air cargo. The Civil Aeronautics Board is similar in some respects to the Interstate Commerce Commission. The Civil Aeronautics Act of 1938 requires that the airlines file a tariff with the Board[49] which includes rules and regulations with regard to the value of baggage, right to cancel flights, time in which notice of claim must be given, etc.

The legality and binding effect upon the passenger of such regulations has been amply upheld in a number of suits.[50] Rather typical was the case of *Meredith v. United Air Lines,* in which ear injury was alleged because of failure to maintain pressure in the passenger cabin, even though a pressurized cabin was warranted. Rule 17 (A) provided that no action shall be maintained for injury or death of a passenger unless notice is given in writing to the general office of carrier within 90 days after alleged occurrence and unless action is commenced within one year. Motion for summary judgment was granted, the court holding that airline passengers are bound by conditions stated in the passenger tariffs on file with the CAB and various airline offices. Such conditions, although not appearing on the ticket sold to the passenger, must be complied with respecting form of notice, time of making claim and commencing suit.

There are similar regulations limiting the value of baggage to $100 unless a greater value is declared at the time of checking same and an additional charge (10 cents per $100 on domestic lines) paid.

Any Good Lawyer Can Handle Aviation Cases

I hope that the above brief and very general treatment of the law applicable to airplane torts will, if it does nothing more, disabuse the minds of the average lawyers of the idea that there is any great mystery attached to aeronautical litigation. If I had the time I would attempt to strip the mystery also from aviation. Suffice it to say that any energetic and intelligent lawyer can prepare an aviation case as easily, in fact, more easily, than he can in any other technical field. There is still no substitute for hard work and careful preparation, but where these elements are accepted and faithfully discharged, I believe the average lawyer will find real interest and pleasure in handling aviation cases and that he will find himself quite capable of doing a good job.

[48]Title 46, U.S. Code Sec. 761.

[49]Markham and Blair, The Effect of Tariff Provisions Filed Under the Civil Aeronautics Act of 1938. 15 Journal of Air Law & Co. 251 (1948).

[50]*Jones v. Northwest,* 22 Wash. (2d) 863, 157 P. (2d) 728; *Wilhelm v. Northwest,* 1949 USAvR 334; *Brandt v. Eastern,* 1948 USAvR 636; *Mack v. Eastern* 1949 USAvR 202; *Lichten v. Eastern,* 1948 USAvR 194, 1950 USAvR 80, 87 F. Supp. 691 just affirmed by U.S. Court of Appeals, Second Circuit, Docket No. 21829; *Meredith v. United,* 1951 USAvR 103.

Default By Inertia

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(Address delivered at 1951 Annual Convention of the Mississippi State Bar Association Buena Vista Hotel, Biloxi, Mississippi)

TO be wanted among friends is a warming experience. It is all important for everyone of us to feel that he belongs. No matter how self-sufficient one may become, he cannot maintain a well ordered mind or do his best work without the affection and respect of friends. So nothing would make me happier than, for the next few minutes, just to be considered a member of the Mississippi Bar Association.

Not long ago I read that some wit had said that eight out of nine people have good judgment and the ninth makes speeches. Well, in a way, I do feel a little presumptuous in coming here to address such a fine body of American people. As much as I desire to do so, I am conscious of my inability to forcefully bring before you something that will measure up to the dire needs of the moment. But who can draw the line between presumption and self-effacement. Perhaps some of the troubles of our time are due to the difficulty of finding, and the greater difficulty of maintaining, a desirable mean between these extremes. Nevertheless, to champion high principles and practices must be worthy, no matter how humble is our effort or how modest is the result. Unless some of us are presumptuous enough to project sound principles occasionally or to resist an unsound scheme, we will not contribute anything to the time or world in which we live.

Whatever we in the legal profession can accomplish can be done more effectively through association with others. This includes the activities of this Association and all the Bar Associations throughout our States. For a lawyer to remain aloof from his Bar Association is to miss many of the opportunities to serve his profession and his Country. Nothing in my professional career, extending back thirty five years, has afforded me more lasting enjoyment and profit than the friendships and activities of the Bar Associations to which I belong. No urge of mine can add to the patriotism of lawyers daily moving within their oaths of office and their self-imposed canons of ethics. My best hope is that upon reflection we may inspire others, with less understanding, and less compulsion, to do as much.

* * *

With uncertainty as to what specific contribution I can make to the important papers presented at this annual meeting of the Mississippi Bar Association, I am, nevertheless, very certain that the duties, fortunes and futures of the lawyers of this State and all States are forever bound with the indissoluble principles that make for a sound Nation, politically, socially and economically. It is plain that there are many among us, in these trying times, who should not continue with the detached attitude that somehow all will be right with the world. All will not be right with the world or with our Country unless more of our people take a view much broader than their personal welfare. Lawyers must help all to understand public questions and to take a stand for high purposes in public life. This involves something of the spiritual meaning so inseparable from the historic bases of our Nation.

Some celestial bodies are referred to as dead planets. They float in endless monotony, devoid of life and of history. This world of ours has had a lively history, conceived in the minds and built upon the philosophies and ambitions of a few. All human history is but a reflection of leaders and of those who followed or were driven. We are living in a great moment of that history and the accomplishments of our generation can rise no higher than the ambitions, the intellects and the morals of those who lead us. Every great political movement of the past germinated in the mind of an individual and became a compelling force when it spread to enough of the strong to rule the many. So every public trend, including every executive decree,

legislative act and judicial interpretation, holds a meaning for each one of us and for those who shall follow us.

If our political and economic structure is to thrive and survive as intended by our founders, then liberty loving people who understand history and the machinery of government must take a determined stand to see that all our people, and particularly our young people, grasp the meaning of this Country and what we have to contribute to the world. Insufficient participation of our people in public affairs is coming to be recognized as the cause of much of our trouble. The sad part of it is that the lack of citizenship participation is due to the ineffectiveness of political leadership on the home or community level.

The United States is a young nation faced with the heavy responsibility of preserving freedom in the world. Tired and despairing countries the world around, and some perhaps a little selfish, are drawing upon our financial and industrial strength. These countries are looking to this powerful young nation for leadership that will bring hope and order out of an impoverished and disorganized world. We dare not prove unequal to the task of preserving freedom. Our task in leading the less fortunate nations of the world to a position of social and economic soundness is made difficult by a worldwide ideology which opposes every basic principle for which our Republic stands.

Cynicism concerning the better things of life is widespread. Our ideals and our aims are distorted and misrepresented by the opposition at home and abroad. Strange pressures and unusual irritations are generating confusion in all phases of our endeavor. Indifference, irritation and confusion spell political and social dangers. When the President of the United States is booed at a baseball game in our National Capital there is something about it that is very disturbing. We have not yet recovered from the tidal wave of public emotion over the dismissal of General MacArthur. We had better look carefully to the causes of such outbursts and we had better be concerned about calmer methods of displaying public opinion. It is very necessary that talented and well balanced citizens do all they can to prevent irritations from causing permanent harm. If our people ever lose their capacity to care whether or not their Government splits, then self-government will surely perish. There never was a time when the people of our Country needed more to understand our history; there never was a time when we needed more to demand sound political, social and economic leadership from our elected representatives.

The disturbed condition of the world today is the latest phase in the evolution of human affairs that has been going on for centuries and which has been most pronounced in the last one hundred years. It is the struggle of the individual against social, political and economic enslavement. It is the individual's fight to throw off oppression and to develop according to his own ideals under just laws. Over the centuries the world improves, but along the shore of time the wave of progress advances and recedes so that some generations suffer bloodshed and privation from which future generations benefit. There is less of trouble and more of progress whenever strong and good leaders appear in the world. The danger is always in powerful minorities forcing unsound schemes upon a lethargic or a disunited majority. We are told by Arthur B. Toynbee in his remarkable work, "The Study of History", that a creative minority has furnished the leadership for every civilization in the history of man and that 20 of 26 known civilizations are dead, having committed suicide through the subsequent failure of that leadership.

If we can thus view world conditions objectively we can adopt a more philosophical attitude toward present trends while not allowing ourselves to lapse into indifference, or to fail to develop and then to put to the front qualified men and women so necessary for sound leadership and progress. In a democracy, or a republic, the people themselves have the means of correcting conditions that need changing. Lawyers should utilize their training and measured reasoning to chart the way through confused times.

What is it, in this march of time and the present confused state of things, that places such heavy responsibilities on our nation? It is our land, our people and our Government. It is our "grand scheme and design in Providence" as John Adams put it. These things need constant emphasis until our people and all their children understand what has made us great and we become more determined to take a firm hold upon our grand traditions that they may be preserved and remain a beacon of hope for the people of this and all countries.

We have been endowed with one of the garden spots of the earth, unexcelled in beauty. Its rocky, wooded hills of New Eng-

land spread to the warm blue hills and valleys of the South. Our great and fertile plains stretch far to reach the majestic snow capped mountains of the West. We have agricultural possibilities beyond our needs and unmeasured wealth in natural resources. Our great rivers and dams turn a million wheels of industry and our trade has unsurpassed access to the great oceans. To appraise the grandeur of our land makes one wish to humbly thank God for so many blessings. This is what our colonists found. It is what they have passed on to us. Its preservation is our responsibility to future generations and should spur us to a high resolve that these things shall not be wasted but shall be used and preserved as a kind Providence must have intended.

As to our people, they found on this continent room for men to grow. There was much work to be done under conditions that gave promise of meeting ideals of equality. There came a constant stream of the most enterprising and venturesome people from all Europe. Long before the land could be known to promise so much they came bringing the strongblood and cultures of many lands and with it a determination to build for themselves a place in which the individual might live in dignity and honor the laws of God, nor bow to the arbitrary mandate of any man.

The land and the people produced the third great element which was the inspired leadership that put together age old principles to form a constitutional government for free men such as the world had never known before. In all history the greatest contribution to the art of self government was that conceived in the minds of those rare, great men who founded the Republic of these United States. It was inspired genius that enabled our forefathers to establish a government where individual initiative thrives; where every man is lord of his castle and may be respected for his own worth; where the minority are free under majority rule and where States have rights under a central government. The built in checks and balances established in and between our executive, legislative and judicial branches is one of our greatest heritages and must be guarded as a bulwark for our freedom. If anything were needed to make us appreciative, we have but to look to the sordid spectacle of the totalitarian governments so prevalent in recent years.

These are the foundations upon which we have built the United States of America where our people derive their basic concept of the dignity of the individual from Christian principles. Here we sincerely believe that human beings have a right to develop their own free wills under just laws produced by men in accordance with the Divine Plan so far as they, in all good conscience, can understand it. These are the things that we must be actively concerned about in the light of what is going on to effect us socially, economically and politically. Internal indifference to what we are and what we can be, is a greater threat to our free institutions than any outside power in the world. We cannot indefinitely pluck the fruit of democracy without caring for the tree.

We, as lawyers, can take justifiable pride in the fact that great lawyers had a major part in establishing this Government, and for a hundred years our people entrusted its development and preservation largely to their care. Recent studies have shown that lawyers held leadership in this Country until about the turn of the twentieth century. The age of great industry and corporate development, the rapid growth of our population, and the organization of large labor unions, has worked a change in the leadership of this Country. Brilliant lawyers such as engendered the political structure of our Government and so closely watched over its development, although not by any means entirely lacking, have been less evident in public life since the turn of the century. Their place in public life, to a large extent, has been taken by men of labor, of industry, by scholastics, and men of social reform. Without deprecating any of our social and economic advances or the good men who have brought them about, it is to be seriously questioned whether we have made comparable progress in political science. Indeed, we sometimes wonder if we have not lost or are not losing ground.

Are the checks and balances so brilliantly provided in our national government functioning as they should, or do we sense an encroachment here and there? Do judges sometimes become involved in matters pertaining to the executive branch when they might better have remained aloof? Has there been serious evidence in recent years that Executives have been prone to usurp functions of the Legislature, and have our Representatives given in too easily to Executive power where they might better have insisted upon respect for the legislative function? We most surely will take a step backward if we fail to insist that our Execu-

tives, our Legislators and our Judges function properly in their respective spheres. We must not suffer default by inertia.

Did I hear someone say that these are glittering generalities. Well let me point out to you that the subversive elements in this Country would be tremendously pleased if they could develop an attitude whereby we would detest such references to our traditions and institutions. High principles cannot be melted down in a crucible. The art of government cannot be developed in a test tube. The most powerful atom smasher ever conceived will add not one mite to the economic improvement of this or any other country until the moral structure of our people balances scientific achievement. In the end the strength of our Country is not so much in what we make as in what we believe.

Things that need repeating are not unimportant because they have been heard before. Good people do not stay away from their churches because they have heard the Christian story since childhood. You do not keep your children away from school because they will hear the same things that you heard about reading, writing and arithmetic. Rather, you want to be sure that they do hear of these things and you hope that what they hear may affect their actions. We can be thankful that here in America those who do understand may still speak out in the greater interest of all.

Seventy-five million people in 1900 have become more than one hundred fifty million people in 1950. In direct proportion to the rapid increase in population, interest in public affairs has decreased. We have shown how more than 48 governments can be united so that these millions live in peace among themselves and with their neighbors. Should our example of government by free men be lost, who can predict the numberless, dark years that will lie ahead before a comparable example arises from a confused world. All citizens must understand democratic processes and exercise the rights of citizenship if we are to remain a self governing people. Under our form of government there is no choice. Either we participate in our public affairs or there is no hope for the future.

There is a growing desire on the part of a great many of our people to better understand public affairs. But the evidence grows that there is widespread misunderstanding of this country's business. It cannot be expected that each individual in this vast nation will do the spade work necessary to discover truth as distinguished from prejudice and propaganda. When he tries, the tremendous amount of information and propaganda, ground out daily through books, periodicals and the radio, is too confusing. What we need is to disseminate information in a fashion that the average citizen can absorb and then discriminate between sound principles and fanatical strategy. The problem is to sift the wheat of information, from the chaff of propaganda, and give it to the people in a way that will inspire them to appreciate what we have and form a firm determination to strengthen this fortress of freedom in a world largely dominated by suppression and terror. America's best hope for the future lies in honest persuasion and an appeal to reason.

The backbone of America is in its towns, townships and cities scattered from the Atlantic to the Pacific and from the Great Lakes to the Gulf. The National Capital and great Metropolitan centers should not exert more than their proper influence. It is in all our communities on the local level where we have the best opportunity to build good public opinion and to encourage interest and participation in Government. Local governments become increasingly less important as we allow the concentration of power in the national government to grow. Present trends must be sifted and explained by sound, patriotic leaders in each community. Lawyers, perhaps more than any other group, understand the functioning of a true republic. They, perhaps more than any other group, have the facilities and ability for making themselves heard in their respective communities. There is great need for an intelligent, demanding public opinion and integrity in the practical operation of government. We, the members of the Bar of this nation, must make our contribution toward supplying these needs.

That the lawyer today does not hold the position of leadership which he once held in public affairs is most regrettable. For the last fifty years lawyers have been concerned so much with the practical solution of other peoples private problems that too many of us have failed to assume enough responsibility for public affairs. Too many of us have failed to obtain a background of history, legal philosophy, political science and economics. The best thinkers among us are now urging a lot of us to stop looking upon our profession as something limited to the solution of concrete private

problems and the earning of our bread and butter. From the time of Cicero, no really great lawyer has been content to do nothing but represent private clients; the urge to serve his profession and his Country is an essential part of his character.

Now is a time to be gravely concerned with ways and means of building up interest in government and sound public opinion for it is the only way we have of effectively controlling elected officials and appointed officers that turn the wheels of government. Woodrow Wilson years ago said what is particularly appropriate today: "Look what legal questions are to be settled, how stupendous they are, how far-reaching, and how impossible it will be to settle them without the advice of learned and experienced lawyers—lawyers who can think in terms of society itself."

Chief Justice Arthur Vanderbilt of the State of New Jersey, a former President of the American Bar Association and a former teacher and Dean of the Law School of New York University, is one of the Country's great leaders for the improvement of government and judicial administration. Not long ago he stated that there has been a disposition on the part of the law schools of the country to think that they are fulfilling their function when they teach private law exclusively, while the sounder method was that used by the eminent early law teachers in this Country who emphasized public law as much as private law and under public law taught not only law but government and political theory. Now, leaders of our profession are hoping to bring about what has been called the "remarriage" of law and political science. Not long ago under the leadership of Justice Vanderbilt there was established at the Law School of New York University what is called The Citizenship Clearing House to fill the need of greater participation in public affairs by our citizens and particularly by young lawyers.

I could be more specific. I could be so specific that we would be here all night discussing tremendously disturbing things that were unknown to us a few years ago. I will touch briefly upon just a few in the hope of stimulating a few people to look beyond the struggle to meet their daily taxes and do something to make more certain that we shall always earn them as a free people.

Some months before a recent Congressional election, Dr. George Gallup disclosed that only 31% of the voters of the Country knew that a Congressional election was to be held in November; only 31% of the voters knew that we had such elections every two years; only one-third of our citizens with college training knew the number of years for which a Representative is elected; and less than 40% of the voters could name the number of Justices in the United States Supreme Court. Fewer people go to the polls in the United States than in any other major democracy in the world. In the last general election in England, voting participation was 50% greater than in this Country. In a recent national election in Canada, one-third more of its citizens voted than in our last Presidential election. In recent general elections, twice as many people per hundred of population voted in France as in the United States. You may interpret these facts in any way you please. You may say that there is a strong communistic vote in France and that there is a strong socialistic vote in England. But you cannot get away from the fact that the whole structure of a Republic is built upon its franchise. If good people do not exercise this right of citizenship there is danger of fanatics developing a following of ignorant or confused voters who may in time exercise unwarranted control.

The impact of the present international situation upon the political system of our Country requires that all thinking people be alert to its dangers. Communism is a titanic struggle between the concepts of self government by free people and the doctrines of totalitarianism with its slavery. Through confusion and subversion, and later through police inquisition and intimidation, communists have taken by the throat one country after another. Their system cannot last. Sooner or later the will of the people to rule themselves is bound to triumph and the whole miserable structure will collapse about the heads of its creators.

The time and manner in which the present Soviet tyranny will end are matters of conjecture but millions of human beings will not for long, on the page of history, submit to slavery under the iron heel. When the change comes there will be at the head of the movement leaders espousing humanitarian principles whose names shall forever dwarf the communist leaders. While there is communist power in the world there will be continuing attacks, both brutal and subtle, upon the institutions of free men. Any danger our Country faces is more from within through wily and crafty fanatics who admittedly move among

us. How ridiculous it is to think that in this land there are some thousands of people who will fall for the sinister communist line. But how ridiculous a communist can be made to look in a home community when the spotlights of patriotism and truth are thrown upon him. Communism can be very largely controlled on the community level if our people become determined enough to hit it hard. I am happy to say that in some places the people are doing just that.

For twenty five years we have been fearing inflation—now we face it. It is threatening our national economy and is pinching our citizens—the white collar worker more than others. There are ways to curb it, and it is up to our national Government to put the curbs into effect. We are suffering now because a depression was fought with a synthetic and unsound economy by piling on taxes and public debts. We are a rich Country but we are not rich enough to indefinitely pour out unlimited natural resources and dollar aid to foreign countries to build their armaments while we support their socialistic governments. For the first time in our history we are being forced to adopt what has been called a garrison economy. We cannot at the same time indulge in socialistic plans for relieving our people of their essential responsibilities and opportunities. Thrift is a word that has had little meaning in recent years for government circles. Government, unlike private business, has not had to make both ends meet. It looks to the taxpayer to keep it solvent while doing too little to economize. If we would avoid the ravaging effects of inflation it is basic that thrift be exercised by government. If we wish to maintain American standards of living it is time that some thought be given to the hard earned dollars of the American taxpayer. The Committee on Federal Tax Policy, a private organization headed by Roswell Magill, former under-secretary of the Treasury, has stated that a cut of ten billion dollars can be made in next year's federal budget by prompt withdrawal of the Federal government from the field of lending, by a cut in unnecessary public works, a drastic curtailment of federal grants and subsidies and an end to the federal purchase of commodities under the farm price support program. I wonder how many people realize that in Washington, in the Pentagon Building alone, there are 35,000 Federal employees, which about equals the population of Vicksburg, Mississippi. Representative Simpson of Pennsylvania recently queried business men on what to do about taxes. Thirty thousand answers were unanimous on cutting Government spending.

Millions of our people have modest savings accounts, government bonds and life insurance wrung out of hard years of toil. These savings are our protection against emergencies in declining years; they are the education of our children; and they should represent health and happiness in a thousand ways beyond the hours of labor that make these savings possible. Everyone of us should be deeply interested in preserving the integrity and purchasing power of the American dollar. Deficit financing to support wasteful government can only lead to inflation and devaluation and a further reduction in the purchasing power of the dollar.

One cure for inflation, often projected, is to tax away earnings of the people so that they will not have so much to spend in a market with decreasing supply. Well, many of our people have waited a long time through depression and war for a washing machine and an extra room to make life a little easier. If the Government is to discourage spending let it set the example. What is the incentive for people to work if a paternalistic government on one hand promises to take care of all their needs and, on the other hand, taxes away their earnings until they can neither save nor spend for anything beyond the necessities of life. When will our people become determined enough to demand that our national Government face up to its moral responsibilities with respect to our money? Our best representatives in government are those who, in sincerity, view themselves as servants of the people—constantly striving to better our welfare.

While taxes become more burdensome all the time, organized crime in the United States is taking a bitter toll from the American people in personal suffering and financial loss. In a remarkable statement before the Special Committee of the United States Senate to Investigate Crime, the great American, J. Edgar Hoover, pointed out that we are in a state of moral depression and the extent of organized crime in the United States is a national disgrace. I mention it here because the underworld, which has a shocking contempt for law, is constantly extending its tentacles and is establishing "unholy alliances between the criminal element and officialdom". This is weakening the moral structure of Govern-

ment at a time when we need to be strongest.

The time has come for some straight thinking on the responsibility for this condition. At a time when we are jealous of the expansion of central government, the Federal Government has been forced to act on crime because the states and our local communities have shirked their responsibilities. Law enforcement will be only as effective as the citizens demand that it be. If the community of individuals does not desire effective law enforcement then crime will run rampant. The ultimate responsibility for stamping out crime rests at home with the citizens of each community and each state. Lawyers, if they will, can awaken increased zeal for civic responsibility. Where there are alliances between the underworld and public officials, aroused citizens can accomplish more than all the new legislation that can be enacted. We do not need more laws. We need a will on the part of our people to see present laws enforced. Crime and criminals, including tainted politicians, cannot stand exposure. The Kefauver Committee, as nothing before, has thrown the spotlight of public disgust upon crime in all its contemptible characteristics. The responsibility, however, must not all be passed to the Federal Government. Each one of us has a responsibility to make it as hard as possible for crooks and shady politicians in our respective communities. The solution lies in aroused and awakened citizens demanding action for law, order and decency.

Short of crime, itself, we should all insist upon qualified public servants who are ambitious to inculcate quality and character in government. It is the function of every lawyer to uphold decent government and not to see it circumvented. We should sponsor capable men and women who will put Christian principles above political expediency. Unless public servants have character themselves they will neither recognize the lack of it in those around them nor have the fortitude to stand up for right and justice and decency. Not enough public servants can stand up with Senator Tobey and say: "I thank my God I am a free man—so free that anything I have ever said or done in public life can stand the white light of investigation." More intelligence and integrity must be brought into the practical operations of representative government.

The mistakes we have suffered in recent years have been too costly to be forgotten. It is not too late for us to yet derive a lesson, costly as it is, from our wasted natural resources, from the inflation of our national economy, from the slanting of a grand government toward socialistic measures, from foreign entanglements and from the loss of American boys.

In conclusion, let me come down from the heights for a moment with a homey example. In a City in our State there was a group of young college graduates, some lawyers, most of them under 25 years of age, that got together and formed a club. That group of young men decided to do something for their community. They sought the advice of one or two older lawyears who had rubbed clothes with politics. They worked and they worked hard and had their City pass several worthwhile measures that improved local conditions. These young men not only studied their problems but they interviewed people and they brought forth reports that were really compelling. They made a real contribution to the community and had they not been scattered by the war they would have accomplished much more. Today, some of them who had their interest keenly aroused in public affairs are back in the harness taking part in statewide questions. These young men are the type that can be and are going to be leaders. Had it not been for the war, they probably today would be in positions of leadership in their community and some less qualified bosses would undoubtedly have been replaced.

Now I have talked a long time and I thank you for listening. If I have appeared serious it is because one who loves his Country is trying in a small way to inspire others who equally love their Country to action in our time. I assure you I have no exaggerated idea of my personal importance in relation to our public problems. I only know, out of years of experience, that most lawyers in and out of Bar Associations could do more than they are doing today to lead this Country along the right road. The future still belongs to us. On the page of history there is given to our generation but a little space. Let the future show it written in bold type, for the improvement of ourselves, for justice to our children and for the glory of America.

The Close Corporation Buy And Sell Agreement Funded By Life Insurance—Some Problems

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THE basic purpose of a buy and sell agreement between stockholders of a close corporation, funded by life insurance on the lives of each of the stockholders, is to effectuate an arrangement whereby the survivors shall have an opportunity to acquire the interests of the decedent and retain control of the business and the decedent's estate shall have a ready purchaser of the deceased's business interests with the necessary cash to make the purchase.

Such a program in its simplest and most common form contemplates ownership by each stockholder of life insurance upon the lives of the other stockholders. The insurance is applied for and owned by each stockholder upon the respective lives of the other stockholders in amounts sufficient to acquire his proportionate share of such other stockholder's corporate interest upon the latter's death. Each stockholder is applicant and owner of the insurance and is the beneficiary thereunder. Premium payments are made by each individual stockholder on the insurance owned by him. Thus, upon the death of any stockholder the survivors have in their hands the necessary funds to carry out the terms of the agreement to purchase the interests of the decedent in the corporation and the decedent's estate pursuant to the agreement will transfer the decedent's stock interest upon payment therefor by the surviving stockholders.

However, factual circumstances and personal views of both the parties and their counsel dictate deviations from the common approach. Such deviations while achieving their desired purpose frequently give rise to other problems. It is with respect to some of these variations in practice that this article is devoted, with particular reference to possible tax consequences.

The Designation Of Personal Beneficiaries Other Than Surviving Stockholders

The parties to the agreement sometime seek a secondary result, i.e., to use the insurance proceeds which are paid for the transfer of the decedent's corporate interest as personal insurance by having it payable to a personal beneficiary of the decedent's choice rather than payable to the surviving owner of the insurance contract. Such an arrangement by-passes the decedent's estate to the extent that no consideration is received by it in exchange for the decedent's business interest which it is obligated to convey to the surviving stockholders. This may give rise to various problems, particularly if the remaining estate is inadequate to pay claims and taxes. Also, heirs or residuary legatee of the decedent if different from the designated insurance beneficiary may raise questions as to the propriety of transfer of estate assets without consideration therefor being paid to the estate.

It would appear that if the estate is left with inadequate funds to pay claims and taxes upon the transfer of the decedent's interest in the corporation that such a transfer is subject to attack by the creditors as a fraudulent transfer. Section 4 of the Uniform Fraudulent Conveyances Act adopted in most states provides—

> "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

Glenn on the Law of Fraudulent Conveyances, 1931, at Page 370, referring to this Section states—

> "In final effect, the test from the creditor's standpoint should be the diminution of the estate, and the first inquiry therefore must be whether the transfer, in view of the consideration received lessened the value of the estate . . ."

In discussing general situations out of which the debtor's estate may be reduced in value but which do not constitute a

fraudulent transfer the author remarks at Page 371—

> "It follows that a consideration which by the very nature of the transaction does not pass into the estate at all, is not within the general rule just mentioned."

Nor can the possible liability of the survivors who take the decedent's interest in the corporation for Federal estate taxes be overlooked if the estate is left with inadequate funds to pay the taxes thereon when the consideration for the transfer has been paid to a personal beneficiary. Section 827 (b) IRC, provides in part—

> "If the tax here imposed is not paid when due, then the spouse, transferee, trustee, . . . or beneficiary, who receives or has on the date of the decedent's death property included in the gross estate under Section 811 (b), (c), (d), (e), (f) or (g) to the extent of the value, at the time of the decedent's death of such property shall be personally liable for such tax . . ."

It would seem therefore that if the tax on that portion of the decedent's estate represented by the business interest transferred to the surviving stockholders and for which no payment has been made to the estate, is not paid by the executor that the surviving stockholders who have received this asset of the estate may be personally liable for the tax. This observation may be tempered by the decisions set forth under the heading of Double Taxation.

Another problem which may arise through by-passing the estate and providing for payment direct to a personal beneficiary of the decedent, is the loss to the surviving stockholders of the consideration paid directly to such beneficiary in determining the cost basis of their stock acquisition. In *Legallet v. Commissioner,* 41 B.T.A. 294, pursuant to agreement each of two partners took out life insurance on his own life with the other partner named as beneficiary. The right to change the beneficary was reserved. Subsequently each partner changed the beneficiary on his contract in favor of his wife or daughter. Premiums were paid by the partnership and charged to the individuals. It was provided that the proceeds of the insurance paid to the named beneficiaries should be applied upon the purchase price to be paid by the survivor for the interest in the partnership owned by the first deceased. Upon the death of one of the partners, insurance proceeds were paid to his wife and accepted by her as first payment upon the partnership interest. Thereafter the surviving partner sold some of the assets of the former partnership and claimed that the insurance proceeds should be included in his cost basis for income tax purposes. It was held that the insurance proceeds received by the wife of the first to die and applied upon such purchase price were not received by the surviving partner nor paid by him, and might not be included in the cost basis of the partnership interest so acquired by him. Even though each of the partners had taken out insurance on the other's life, rather than upon his own life, and then named such other partner's wife as beneficiary, there is serious doubt that the conclusion would have been different. The Board appears to place its emphasis upon the mode of payment, rather than the form of ownership. The establishment of constructive receipt of the proceeds by the surviving partner so as to claim inclusion in cost basis remains in doubt.

Double Taxation

The Commissioner of Internal Revenue has from time to time and under varying factual circumstances attempted to include in the estate of the decedent both the value of the life insurance proceeds and the value of the business which was transferred to the surviving stockholders or partners pursuant to agreement. That the Commissioner is still interested in this feature, despite repeated reversals, is demonstrated by his most recent attempt to establish double liability in May of this year in the case of *Ealy Estate v. Commissioner,* C.C.H. Dec. 18, 302M. In view of the different circumstances under which the Commissioner has attempted to invoke double liability, it will be of interest to review the various cases involved.

The first case of this sort was *Boston Safe Deposit and Trust Co. v. Commissioner,* 30 B.T.A. 679 (1934). Here a partnership took out life insurance on the life of each member of the partnership. The partnership owned the life insurance and paid the premiums thereon. The proceeds were payable to each of the individual insureds' estate. The Board included the deceased partner's full partnership interest in his estate for tax purposes, but excluded the insurance proceeds which were paid to the deceased's estate.

In the next case, *M. W. Dobrzensky, Executor v. Commissioner,* 34 B.T.A. 305 (1936), each partner applied for life insurance on his own life. Premiums were paid by the partnership. The proceeds were payable to each individual insured's wife. Insurance contracts were apparently owned and controlled by the individual insured. Here the Board of Tax Appeals arrived at the same conclusion concerning tax liability, but reversed its reasoning. It included in the deceased's estate the value of the insurance but excluded the value of his partnership interest. The Board observes—

> "Decedent acquired the insurance policy there involved by purchase or exchange. The consideration, therefore, was decedent's relinquishment of certain rights in partnership property. After that acquisition decedent no longer had any right at his death in the relinquished assets, but instead had a taxable interest in an insurance policy. Obviously the decedent could not be taxed with an asset as his own at death, and at the same time taxed with a consideration he relinquished for that asset. . . . However, since decedent had relinquished certain partnership interests in exchange for the insurance asset purchased, only the value of his remaining partnership interests at his death was includable in his gross estate."

The next case involved a close corporation, being that of *Estate of John Mitchell v. Commissioner,* 37 B.T.A. 1 (1938). Here, pursuant to agreement each of two shareholders in the corporation took out life insurance upon his own life. While originally each was to pay premium on the insurance on the other's life, it was subsequently split equally and was paid by the corporation and charged to their personal accounts. The right to change the beneficiary was reserved by each insured. Insurance proceeds were payable to the estate of the insured. There was included in the decedent's estate the amount of insurance proceeds but corporate assets to the extent offset by such insurance proceeds were excluded. The Court remarks—

> "However, such insurance proceeds were received by decedent's estate subject to the terms of a valid and binding contract that they be applied to reduce the purchase price to be paid by Lennen for the decedent's 900 shares of Lennen and Mitchell, Incorporated, stock which by the same contract Lennen was obligated to buy. Those shares being so burdened, were not subject to the unfettered ownership of the decedent's estate. The effect of the contract was to reduce the value of the estate's interest in such stock by an amount equal to the amount of the proceeds of the insurance policy, and the value of the stock as so reduced must be deemed as its value for estate tax purposes."

The Commissioner has continued in his attempt to impose double tax liability even when the insurance proceeds have been payable neither to the deceased insured's estate, or his wife, but payable rather, to those surviving having an interest in the business. In estate of *Ray E. Tompkins v. Commissioner,* 13 T.C. 1054 (1949) the partnership applied for insurance on the life of each partner and paid the premiums thereon. The insurance proceeds were payable to the surviving partner. The Court in finding that only insurance proceeds were includable in the decedent's estate for tax purposes observed—

> "At the time of and after decedent's death his interest or the interest of his estate in the partnership assets was limited under the partnership agreements to the amount of the proceeds of the policy of insurance on his life."

The *Ealy case, supra,* involved a trust established by the stockholders of a close corporation. The trustees took out insurance on the life of each of the stockholders and retained the ownership and control thereof. Premiums were paid by the corporation. The proceeds of the insurance policies were payable to the trustees. In accordance with the trust agreement the proceeds were distributed among the then stockholders in proportion to their stockholdings and thereafter used by such stockholders to purchase the stock interest of the deceased. The Tax Court concluded that the Commissioner erred by including the life insurance proceeds in the decedent's gross estate, and held that as between the two, only the value of the stock sold under the buy and sell agreement were includable in the estate for tax purposes.

From the foregoing it may reasonably be concluded, that if, pursuant to a buy and sell agreement, a decedent's business assets are transferred to his surviving associates, upon payment to his estate or even to his wife, as in the *Dobrzensky* case, of pre-arranged life insurance proceeds, that such

assets will not be included along with the insurance proceeds, in his taxable estate. This appears to be true whether the insurance is applied for by the corporation or partnership or by the individual stockholder or partner, and whether or not the premiums are paid by the business. However, such decisions do not guarantee that an effort will not be made by the Commissioner to assess double tax liability as evidenced by the recent *Ealy case, supra*. Beyond the particular factual circumstances of these cases it does not appear what may have motivated the Commissioner in his attempt to include both insurance proceeds and business interest in any one of these cases. The *Ealy* case causes one to wonder whether any arrangement is free from possible attack by the Commissioner. However, it would seem beyond doubt, that the Commissioner would not seek to include life insurance proceeds along with the decedent's corporate interests in his gross estate, if pursuant to an enforceable buy and sell agreement, the life insurance procured on decedent's life to finance the survivor's purchase was applied for by the stockholders each on the other's life with full control and ownership retained by the applicant, premiums paid by such applicant and the proceeds payable to the applicant upon death of the insured.

Stock Retirement Arrangements

In those states in which a corporation is permitted to purchase its own stock, stockholders sometimes arrange for purchase of the stock of a deceased stockholder by the corporation, rather than individual purchase by the surviving stockholders. This is generally referred to as a stock retirement plan. Under such an arrangement the corporation usually owns and pays premiums upon insurance upon the lives of each of the stockholders, and the proceeds are payable to the corporation upon the death of any individual stockholder. Insurance proceeds are then used to purchase the interest of the deceased stockholder and the stock so acquired is held as treasury stock. Such an arrangement gives rise to several tax questions.

Section 102 of the Internal Revenue Code imposes a special surtax on corporations improperly accumulating surplus "for the purpose of preventing the imposition of the surtax upon its share holders . . . through the medium of permitting earnings or profits to accumulate instead of being divided or distributed." The question then is, may corporate surplus be used to pay premiums on life insurance owned by the corporation on the lives of its stockholders without running afoul Section 102. The answer appears to lie in the determination of whether such use of funds is within "the reasonable needs of the business." *Sub-paragraph (c) Section 102.* Assuming no collateral evidence that the stock retirement program is essentially for the purpose of avoiding surtax, the view has generally prevailed that use of surplus in such manner is not within the prohibition of Section 102.

This view has been strengthened by the recent case of *Emeloid v. Commissioner,* 189 F.2d 230. The question involved was whether sums borrowed by a corporation for the purchase of single premium life insurance policies on the lives of its two principal stockholders constituted "borrowed invested capital" within the meaning of the excess profits tax law. The Tax Act requires for the indebtedness to be taken as a proper credit that it must be "incurred in good faith for the purposes of the business." The insurance was first acquired by the corporation as key man insurance and subsequently appropriated to fund, at least in part, the operation of a stock retirement plan newly entered into between the corporation and the stockholders. The Court in referring to the use of the insurance to fund the stock retirement agreement subsequently entered into by the parties observes—

> "The trust (agreement covering stock retirement program) was designated to implement the original purpose (key man insurance) and at the same time add a further business objective, viz., to provide for continuity of harmonious management. Harmony is the essential catalyst for achieving good management, and good management is the sine qua non of long term business success. Petitioner deeming its management sound and harmonious conceived of the trust to insure its continuation."

The Court further observed—

> "The trust agreement provides petitioner with a method of subjecting all potential purchasers to a screening test, thus permitting the corporation to choose its new shareholders in a highly selective manner. Funds derived from the resale would then be available to the petitioner and provide it with needed working capital."

The Court concluded that the stock retirement program served a real business purpose.

While the case did not involve Section 102, the Court's comments upon the character of a stock retirement program lends strong support to the use of surplus for such purposes as being proper within the meaning of Section 102. However, the warning of one writer, made before the *Emeloid* decision, would still appear to be pertinent. *White, Business Insurance* 949, at Page 372 referring to Section 102 I.R.C. and the corporation stock purchase plan observes—

> "By way of warning, however, it should be stated that if an aggravated situation already exists—a large and increasing surplus combined with a poor dividend record—it would be folly on the part of the corporation to enter into a corporation stock purchase plan without first having declared proper dividends, based upon a new dividend policy commensurate with its earnings and surplus position."

Paragraph (1) of Section 115 (g) I.R.C. provides that if a corporation redeems its stock in such a manner as to make the redemption in part or in whole essentially equivalent to the distribution of a taxable dividend, the amount so paid to the extent that it represents a distribution of earnings or profits shall be treated as a taxable dividend. Individual circumstances may determine the application of Section 115 (g) to the actual redemption of stock outstanding in the estate of a deceased stockholder pursuant to a stock retirement plan.

Premiums paid upon life insurance held by a corporation under a stock retirement plan should not be subject to question under Section 115 (g) where such plan has a reasonable business purpose. See *Emeloid case, supra.* If the stock retirement agreement provides for the redemption of all of the stock of a particular shareholder, thereby terminating his interest in the affairs of the corporation, such redemption would not affect a distribution of a taxable divident. *Reg.* 111 *Sec.* 29.115–9.

Paragraph (3) of Section 115 (g) enacted in the 1950 Revenue Act provides that Paragraph (1) shall not be applicable if the value of the stock retired by the corporation comprises more than 50% of the value of the net estate of the decedent and the distribution, i.e., value of redeemed stock does not exceed the estate, inheritance, legacy and succession taxes imposed because of the decedent's death. Certain time limitations are imposed. Beyond this situation any stock retirement plan which calls for but a partial purchase of the decedent's stock interest will be examined in the light of its individual circumstances in determining the applicability of Section 115 (g).

A stock retirement program may produce an undesirable income tax situation for the surviving stockholders in the event of subsequent sale of the entire business to new owners. Purchase by the corporation of the deceased stockholder's shares in the corporation reduces the number of outstanding shares, and accordingly appreciates the book value of the survivors' shares. Their cost basis remains the same, and in the event of subsequent sale at their enhanced value an appreciable capital gains tax will be involved. Of course, resale by the corporation of the stock which it has held as treasury stock after redemption following the death of a stockholder will alleviate the capital gains situation for the surviving stockholders in the event of subsequent sale of their interests. On the other hand, if the stock of a deceased stockholder, rather than being purchased by the corporation, is purchased by the individual surviving stockholders the capital gains problem will be relieved in part at least in the event of subsequent sale of their interest in the business. The book value of their original shares is not increased by the retirement of the number of shares outstanding; for the newly acquired shares they will take as a cost basis whatever value they were acquired at from the estate of the deceased stockholder.

As was indicated in the introduction of this article, its purpose was merely to point up and comment upon some of the problems involved in connection with the use of stock buy and sell agreements, as a means whereby surviving stockholders may acquire a decedent's interest in a close corporation. It is not intended to recommend any particular method as the one and only solution. Varying circumstances require differing treatment. However, it may be said that the simple direct approach initially referred to, will usually be adequate to effectuate the desired results, i.e., continuing control by the survivors, and a ready purchaser of the decedent's interest.

The "Special Employee" Rule

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IT IS fundamental that one who employs a servant to do his work is answerable to strangers who have been injured by the negligent act of the servant in the course of his work.

Increasingly frequent is the attempt to impose liability upon the servant's general employer even though the servant has been loaned to another employer to do a particular job. The relationship thus established between the servant and the "temporary" employer, and who should be held liable for the servant's negligence has been the subject of much litigation.

Since this paper is addressed to those lawyers engaged in the defense of personal injury suits, what follows here is intended to analyze the decisions and point out reasons why the general employer is not liable for the negligence of the loaned employee while such employee is doing the work of the borrowing master.

To you, the facts of your case involving this problem may indicate that you have a good defense, since it appears that your assured's employee was loaned to and actually in the service of another when the unfortunate accident occurred causing injury to a third party who brings suit against your assured to recover damages for the personal injuries he has sustained.

However clear the "Special Employee" rule may seem on the face of it, there still may be difficulties encountered in the application of it to your particular case.

It is found from an analysis of the factual situations in the cases cited that there must be four actors operating on the scene. They are:

A—The loaning employer
B—The loaning employer's regular employee
C—The borrowing employer
D—The injured suitor

It is assumed, of course, that some one was negligent in conducting the operations which brought about the accident.

The defense lawyer should be concerned with determining whether on the given facts a situation has taken place which *converts* the employer's regular employee to a "Special Employee" of another, *i.e.* to the service of the borrowing employer with control in the latter.

The Courts have generally agreed that there are at least two tests, both of which must be present, if the conversion can be held to have been accomplished. Even then, difficult factual problems may arise during the trial which the court may feel must be sent to the jury for it to decide.

It is the author's opinion, however, that when these two recognized tests are present in the proof, the Court should withdraw the case from the jury and decide the issue in favor of the lending employer as a matter of law.

These tests are clearly recognized by the Courts as:

1.—Whose work is being performed, and
2.—Did the borrowing employer have, and did he exercise actual control over the borrowed employee.

The "Special Employee" defense should be recognized early by the defense lawyer. He should make a thorough search for the facts which will support such a defense. When the indisputable facts are present, embodying the two tests heretofore enumerated, there should no longer be any doubt as to the right to have the matter decided as a question of law in favor of the lending employer, *i.e.,* a directed verdict.

For an illustration which gives rise to such a defense, and a complete defense the author believes, let us assume the following hypothetical situation:

"B" Corporation obtains the contract to construct for the owner the substructure and superstructure of a power plant.

"C" Corporation obtains from the owner the steam and piping contract which includes the furnishing, unloading and installation of all pipe for a complete piping and steam system in the power plant.

Both contractors are what are known as "prime contractors." Neither is a subcontractor of the other nor are they in any way financially interested in the other's contract or work. Both employ their own skilled and unskilled laborers and each has certain small tools and small equipment but "B" also has on the site of the work, through necessity, heavy equipment

such as drag lines, bulldozers and caterpillar-mounted cranes.

"C," before it commences its contract discovers that "B" has on the site this heavy equipment, some of which "C" may need in performing its contract. As a result of this discovery, "C" persuades the Power Plant (owner) to work out an agreement with "B," whereby "C" may requisition from time to time from "B." a caterpillar-mounted crane and operator at a stipulated hourly rate for the crane plus the reimbursement to "B" for the labor cost of "B's" crane operator while operating the crane at the site of "C's" work.

"C," having by contract agreed with the Owner to furnish, unload and install all pipe in the system, has a carload of pipe to unload, which car has recently been delivered to "C" on a spur track near the power plant. The pipes are approximately 40 feet in length and 24 inches in diameter. It is necessary to employ the use of a power crane and an operator to unload the pipe. "C's" superintendent fills out certain forms which have been prepared and delivers them to "B's" superintendent, requisitioning a crane and operator for the unloading operation. "B's" operator delivers the crane to the site of "C's" work at the railroad spur track whereupon "C's" foreman, Jones, directs the crane operator where to place the crane so that the end of the boom will be directly over the railroad car.

"C" has its own steel cables and pipe hooks. Prior to the commencement of the unloading operation, "C's" foreman "rigs" the crane with the cables which have at each end a pipe hook. These pipe hooks are used by the workman to insert in each end of the pipe before the lifting operation is commenced.

Jones, the foreman for "C," climbed into the railway car along with Smith, another employee of "C." Jones gave the recognized hand signal to the crane operator to lower the cables over the car, whereupon Jones inserts a hook into one end of the pipe and Smith does likewise. Jones gave the up, or lift, signal by means of holding the hand upward and the crane operator commenced the lift. When the pipe cleared the top of the railway car, Jones then gave a "swing" signal to the crane operator, which is done by pointing in the direction the "swing" is to be made for lowering the pipe to the ground.

The operation has proceeded for several hours with Jones giving all the signals which are required to be given, to the crane operator, when suddenly it was discovered by Jones that Smith had for some reason or other, grabbed ahold of the pipe hook which he had already inserted into the pipe and was being lifted above the car. At this moment, Jones gave the "emergency" or "stop" signal to the crane operator. This signal is given by extending both arms horizontally. The crane operator who had not seen Smith up to that moment, complied with the "stop" or "emergency" signal. Smith either was jerked from his hold on the pipe hook or let go and fell to the ground and was injured.

Smith has received workmen's compensation benefits for a considerable period of time and brings suit against "B" joining his employer "C," as a defendant pursuant to the statute authorizing such joinder.

Prior to the delivery of the crane to "C," "B's" superintendent had told the crane operator to take the crane over to "C" and "do whatever they direct you to do."

Query: Was the crane operator the "special employee" of "C" for this particular unloading operation?

Since the courts have held that two tests must be present—(1) whose work was being performed, and (2) did the borrowing employer have and exercise control over the loaned employee—it would appear that both tests are present.

Certainly "B" was merely carrying out the prior arrangement with "C." "B" had actually rented its crane and operator to "C." In addition to this, the foreman of "C" had "spotted" the crane when it was delivered to "C's" site. He had given all operating signals to the crane operator, in fact "C" had taken over control. "C's" foreman had "rigged" or arranged the cables and pipe hooks on the boom to fit the job about to be undertaken. The cables and pipe hooks belonged to "C" and were no part of the equipment furnished by "B" under the loaning agreement.

From this factual situation it would be readily admitted by the plaintiff Smith that test No. 1 (whose work was being performed) was present since there could not be any question about that fact. However, as to test No. 2 (control), the plaintiff will no doubt deny that such control was present. He may claim (1) that the mere pointing out of where the work was to be

done and (2) giving the usual hoisting signals to the crane operator did not under the law amount to *assuming* and *exercising control over the crane operator* who, of course, is the general employee of "B." The plaintiff may also contend that "B" paid its crane operator his regular wages and was merely reimbursed by "C" for these wages.

Finally Plaintiff Smith will argue that since the instrumentality, to-wit, the crane, was owned by "B," that it was operated by a servant and employee of "B" who paid the wages of the crane operator, therefore, test No. 2 (control) was not present. It will be further claimed by the plaintiff that there was no *actual severance of* the general employment between "B" and the crane operator.

The plaintiff, of course, charges that "B" is responsible for and brought about his injuries because of the operator's negligent operation of the crane; in other words, that he should have lowered the plaintiff to the ground with the pipe and should not have suddenly stopped the progress of the hoisting operation causing him to fall to the ground.

The decisions indicate that although the loaning employer pays the wages of the loaned employee this is not decisive; in fact, it is of no consequence when the two principal tests are clearly present.[1]

The modern trend of the courts is to determine who has *actual control* over the loaned employee on the *particular job* being done, no matter *how short the duration of the job is,* when it also clearly appears that the work being done is solely that of the borrowing employer.

In determining whether or not the loaned employee is the "special employee" of the borrowing employer many decisions are reported. In some of these decisions the courts have themselves created unnecessary confusion in what would otherwise be a very simple question.

Most of the decisions cite and some rely on the case of *Standard Oil Company v. Anderson.*[2] It is referred to by some of the courts as the "leading case" in the United States on the question. Unfortunately some of the courts have been led astray by a failure to thoroughly analyze the opinion in the Standard Oil case. The pertinent paragraph of the decision in the Standard Oil case quoted next below, when clearly read and understood, sets forth the correct guides by which it can readily be determined what the correct decision should be when based upon the presence or absence of the vital tests:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into general service. He may then enter into an agreement with another. If that other furnished him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hace vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. *In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it,* because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other, *we must inquire whose is the work being performed*—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."

The Supreme Court clarified its position by the following statement in its opinion:

> *"The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it."* (page 483 L. Ed.)

The Nebraska Supreme Court has recognized the "Special Employee" doctrine in the case of *Mansfield v. Andrew Murphy & Sons, et al.*[3]

[1] *Wyle-Stewart Machinery Co. v. Thomas,* 192 Okla. 505, 137 P. 2d 556.

[2] 212 U. S. 215, 53 L. Ed. 480.

[3] *Mansfield v. Andrew Murphy & Sons,* et al, 139 Neb. 793, 298 N. W. 749.

In this case the defendant owned a portable crane which it rented to Ford Bros. Van & Storage Co., with operator, for $5.00 per hour, to hoist a heavy printing press into a building. The Storage Company had the hoisting contract. The president of the storage company directed all activities of everyone on the job and gave all hoisting signals to the crane operator who was a general employee of Murphy & Sons Co. from whom he received his wages. An employee of the Storage Company was injured during the hoisting operations and brought suit against the Murphy Company for damages. From an adverse judgment below Mansfield appealed to the Supreme Court of Nebraska. The Nebraska court held:

"The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for the employee's acts." (Syl. 1, N. W. Rep.).

The opinion states:

"Not only are the facts as to the terms of the contract undisputed, but what the parties did in the carrying out of the contract is likewise not controverted. It clearly appears that *Ray A. Ford, the president and general manager of the Ford Bros. Company, had the supervision and directed the activities of all persons helping; that he was 'boss on the job,'* and exercised the right of control there at that time. No other logical inference can be drawn from the evidence. *There is nothing in the evidence from which it might be reasonably inferred that Andrew Murphy & Son, Inc., reserved or had or exercised any control of the hoisting truck or operator after it arrived at the Baum Building and was hooked onto the equipment of Ford Bros. Company, other than the operation of the winch on the truck, which was operated by Genandt, on signal from Ford.*"

and

"Appellant also cites *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 S. Ct. 252, 254, 53 L. Ed. 480, as a leading case on the proposition under discussion, and quotes in full in his brief the syllabus of that case without further comment. Had the evidence established the facts as alleged in the petition, that is, that the Ford Bros. Company contracted orally with the defendant Andrew Murphy & Son, Inc. 'to hoist the said printing press from defendant Ford Bros. Company's truck to the second floor of said Baum Building,' the case cited would have had greater application. But, according to the evidence, the agreement, in effect, was that the Murphy Company would loan or hire its 'wrecker' or hoisting truck to Ford Bros. Company to be used to help it, Ford Bros. Company, hoist a machine into the Baum Building. *Ford Bros. Company appears to have been an independent contractor, to have had the contract to place the printing press in the Baum Building, and had and exercised supervision and control over all employees* working on that undertaking. The Ford Bros. Company *merely employed the Murphy 'wrecker' to assist in doing that work at so much an hour. The Murphy Company did not reserve the right to direct or in any manner supervise the work of the hoisting truck or of Genandt, and, so far as the record shows, it did not. The work was thus the work of the Ford Bros. Company, and not the work or undertaking of the Murphy Company.*"

"The facts in the instant case materially differ in principle from the facts in the cases relied upon by the appellant. This is a case where one party, the defendant Andrew Murphy & Son, Inc., put its hoisting truck with the operator thereof at the disposal of another, Ford Bros. Van & Storage Company *to assist in a particular service under the exclusive control of the latter, during the performance of which the employee, Genandt, from the time of his arrival at the Baum Building, stepped aside from the business and control of Andrew Murphy & Son, Inc., his first employer, and became, for the time being, the special servant of Ford Bros. Company, his substituted employer.*"

The decision of the U. S. Supreme Court in the Standard Oil Case, supra, was thoroughly analyzed in *Western Marine & Salvage Co. v. Ball*,[4] opinion of Van Orsdel, Associate Justice.

In this case the Salvage Company had purchased some ships and was wrecking them in the yard of the Virginia Ship Building Company. One Simon was engaged in the iron and scrap business. Simon

[4] *Western Marine & Salvage Co. v. Ball*, 37 F2d 1004 (Court of Appeals, Dist. of Columbia).

contracted with Salvage Company to purchase the iron and steel salvaged from the ships. The Salvage Company owned an electro-magnet crane. Under the agreement to purchase the scrap Simon had the right to employ Salvage Company's crane with operator at actual cost of operation. The operator was an employee of Salvage Company. During the subsequent operation of the crane while breaking up the scrap, Ball, an employee of Simon, was injured when a piece of metal struck him. Ball brought suit against the Salvage Company to recover damages for his injuries. There was a judgment for Ball and the Salvage Company appealed.

The Court of Appeals in its opinion said (p. 1005):

"The principal question presented, and on which we think the case turns, is whether the crane operator was, at the time the injuries were received, the servant of defendant or of Simon. If he was not the servant of defendant, that is the end of the case, and it is unnecessary to inquire into the other assignments of error on which the appeal is based.

"It appears from the testimony of Simon that one Harry Steinbraker was his foreman, and that Simon was only intermittently in attendance at the yard. He testified, however, that 'he had seen the crane working on his material a number of times,' and that Steinbraker testified that he was foreman for Simon, and that he 'gave instructions as to what iron should be broken in the ship yard,' and that when he was not present one Gus Marshall, an employee of Simon, 'was left there with instructions to tell the crane operator what material to break and what not to break.' It thus appears that the work being done was the work of Simon and not the work of defendant company."

The court took note of the fact that Ball relied chiefly on the decision of the U. S. Supreme Court in the Standard Oil Case, supra.

After setting forth in its opinion the prevailing facts as found in the Standard Oil case, the Court of Appeals said: (page 1005)

"We are at once confronted by the controlling distinction between the Standard Oil Case and the case at bar. There, the oil, dock, ship, and winch, were owned by the oil company. Here everything was under the ownership and control of Simon, except the crane, which belonged to the defendant, and was operated by an employee of that company. There the work being done was the work of the Standard Oil Company. Here the work being done was the work of Simon, and not defendant company. There the winch, drum and operator were furnished the stevedore at a fixed price. Here the crane and operator were furnished Simon at a stipulated price. The mere fact that defendant reserved in its contract the privilege of using the crane and operator on its work at times when not used by Simon is immaterial. We are concerned with the determination of whose servant the operator of the crane was at the time the crane and operator were engaged on Simon's work, and especially at the time the accident occurred."

The Court of Appeals further took notice of the fact that Justice Moody in his opinion (Standard Oil Case) cited and distinguished two cases, *Murray v. Currie,* L. R. 6 C. P. 24, and *Rourke v. White Moss Colliery Co.,* L.R. 2 C.P.D. 205, and quoted from Justice Moody's opinion thusly:

" 'It should be observed that in each of them it clearly appeared in point of fact that the general servants of the respective defendants had ceased for the time being to be their servants, and had passed under the direction and control of another person upon whose work they were engaged.' The learned Justice then quoted from O'Brien, J., in *Higgins v. Western Union Telegraph Company,* 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537, as follows: *'The question is whether at the time of the accident, he was engaged in doing the defendant's work or the work of the contractor. . . . The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct.'* "

Finally, the Court of Appeals in reversing the judgment below said (pp. 1006, 1007)

"Here (Standard Oil Case) the court expressly finds that the winchman was engaged in doing the defendant oil company's 'own work, by and through its own instrumentalities and servant, under its own control.' But the facts in the

present case impel a different conclusion. The master mechanic of defendant company testified that when 'I got orders to give Mr. Steinbraker (Simon's foreman) a crane man and a crane to break scrap, I sent him to Mr. Steinbraker to do what he was told to do.' With the transfer under this order, the crane operator became an important factor in Simon's force for carrying on his work. *Any importance that may be attached to the fact that defendant paid his wages is overcome, not only by its reimbursement by Simon, but by the nature of the relation established between the operator and Simon. When the crane and operator were turned over to Simon or Simon's foreman. they were converted into his hired agencies for the time being for doing the particular work to which they were assigned, subject to his direction and control.*"

and:

"In the instant case Simon was not even occupying the position of an independent contractor, but he was in the position of the owner of the material being broken, and as such in full control and supervision of the work. *It was his own work, and not the work of defendant company.* Defendant had parted with ownership of the material, and was no longer concerned with its use or disposition. *With this distinction clearly before us, we find no difficulty in reaching the conclusion that the operator of the crane, at the time the accident in question occurred, was the servant of Simon, and was engaged in doing his work.*

"The motion for a directed verdict should have been allowed, and the case is reversed, with costs, and remanded for further proceedings not inconsistent with this opinion."

It is apparent that Justice Moody reached the right conclusion in the Standard Oil case, because the facts clearly showed that (1) the oil, (2) the dock, (3) the ship, and (4) the winch were all owned by the Oil Company, and (5) the operator of the winch was in the general employ of the Oil Company. The opinion by Justice Moody based on the facts so found states (p. 483 L. Ed.):

"One who employs a servant to do his work is answerable to strangers for the negligent acts or omissions of the servant, committed in the course of the service. The plaintiff rests his right to recover upon this rule of law, which, though of comparatively modern origin, has come to be elementary. But, however clear the rule may be, its application to the infinitely varied affairs of life is not always easy because the facts which place a given case within or without the rule cannot always be ascertained with precision. The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, *it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation.*"

In *Wyle-Stewart Machinery Co. v. Thomas,*[5] the Oklahoma Supreme Court stated the facts thusly:

"The State of Oklahoma, through its highway department, in conjunction with the United States Government, acting through WPA, was doing certain road work. Under this contract, State was required to furnish certain machinery. The State entered into a contract, evidenced by certain writings, with company whereby company was to furnish to State for a specified number of hours, at a stated hourly rate of pay, a power driven shovel and an operator therefor. In keeping with this contract company sent a shovel at State's direction to the job and sent Jones to operate the shovel under the following instructions: 'He told me to go out there and do what they wanted done, that they had a man there to tell me what they wanted to do, but not to tear up the shovel, to use my judgment about whether I was injuring the shovel or not.' Company was to pay his wages, as the operator's wages were included in the hourly rate. State

[5] *Wyle-Stewart Machinery Co. v. Thomas,* 192 Okla. 505, 137 P. 2d 556.

then put the shovel and operator to work on the WPA project."

The Supreme Court of Oklahoma held:

"Where master has loaned servant to another for special purposes, acts of negligence committed by servant while in service of borrowing master do not render lending master responsible under rule of *'respondeat superior.'"* (Syl. 2, P. Rep.)

"Where general master lends servant to another for a special purpose, servant is regarded as servant of borrowing master as to anything done in special employment and borrowing master is responsible therefore to third persons although servant remains general servant of general master." (Syl. 3, P. Rep.)

"In determining liability between lending master and borrowing master for a particular act of negligence of servant in general employ of lending master committed while servant is on loan to borrowing master, master which has direction and control over servant's work as to method of doing work is responsible notwithstanding that lending master continues to pay servant and retains power to hire and fire." (Syl. 4, P. Rep.)

Thomas, a WPA employee, was injured as a result of the use of crane. He brought suit against the Machinery Company. Judgment for Thomas and the defendant Machinery Company appealed.

The Oklahoma Court in its opinion (at p. 560 P. Rep.) stated:

"Company had no agent at the scene to superintend or give directions. WPA had a general superintendent, who while describing the control as co-operative, seems not to have exercised any detailed or immediate superintendence of the duties of the shovel and truck or the operators thereof. State's agent, Buster, performed the duty of immediate superintendence, and the operator of the shovel and the drivers of the trucks took orders from him. His testimony shows he exercised close control of this, giving orders as to the position of the shovel, its procedure for loading the trucks, and he specifically directed the route and routine of the trucks as they approached the shovel to be loaded. He testified he gave his directions by hand signs. In this particular instance, owing to the way the rock had been dynamited and the manner in which it lay, it was necessary to place the shovel in a position with respect to the rock to be shoveled and the trucks that had not been theretofore used; and it was necessary to have the trucks approach the shovel in a position not theretofore used and not as safe or as desirable as the other approach; and Buster had been taking extra precautions when having the loaded and emptied shovel moved over the trucks. This one instance appears to have been the only instance where the unloaded shovel was swung over the cab, and Buster testified that Jones violated his (Buster's) instructions when he did so."

The Oklahoma Supreme Court reversed the judgment, stating (pp. 538-559, P. Rep.):

"The authorities generally, and this court in particular, have recognized that a servant may be loaned by the master to a third person to perform services for the third person, and to an extent the servant may assume a relationship to the borrowing master that overshadows and in many respects delimits the relationship to the lending master. It is recognized that acts of negligence committed by the servant while in the service of the borrowing master may not serve to render the lending master responsible under the rule of *respondeat superior.* But as to the case with so many principles of law, the difficulty of applying them arises from the varying fact situations.

"There is a line of cases wherein the hiring master, the one who lends, is regarded as the general master, and the master who borrows the servant is regarded as the special master, and the responsibility of both or either for the acts of negligence of the servant is judged by the nature of the duty being performed by the servant at the time, and which of the two masters is exercising control. Company cites and relies on this line of cases. *Thomas v. Great Western Mining Co.,* supra; *Devaney v. Lawler Corporation,* 101 Mont. 579, 56 P. 2d 746; *Steele v. Wells,* Tex. Civ. App. 134 S. W. 2d 377; and *Shapiro v. City of Winston-Salem,* 212 N. C. 751, 194 S. E. 479. This rule is well stated in the editorial headnotes to the annotation appearing in 136 A. L. R. 525 as follows: 'Generally. the fact that a person is the general servant of one employer does not,

as a matter of law prevent him from becoming the particular servant of another, who may be held liable for his acts; and, as a general proposition, if one person lends his servant to another for a particular employment, the servant, for anything done in that employment, is regarded as the servant of the one to whom he has been lent, although he remains the general servant of the person who lent him. An employer is not liable for injury negligently caused by a servant if the latter is not at the time in the service of the employer, but in the special service of another, although the question of liability is ultimately dependent upon the determination of who has the power to control and direct at the exact time of the act in question. In other words, in determining whether, in respect of a particular act, a servant, in the general employment of one person, who has been loaned for the time being to another is the servant of the original employer or of the person to whom he has been loaned, the test is whether, in the particular service which he is engaged to perform, the servant continues liable to the direction and control of his general employer or becomes subject to that of the person to whom he is lent—whether the latter is in control as proprietor so that he can at any time stop or continue the work and determine the way in which it is to be done. with reference not only to the result reached but to the method of reaching it. The mere fact that the general employer continues to pay the wages of the wrongdoer will not make him liable for the wrongful act where it appears that the person to whom he was lent controls him entirely in regard to the work to be done."

In *Norfolk & W. Ry. Co. et al v. Hall,*[8] Hall, the injured plaintiff, was in the regular employment of the American Railway Express Company. However, on the occasion of his trip which resulted in his injury he had been loaned to the Railway Company which latter company set him to work in the transportation of mail under an agreement between the Railway Company and the United States Government. Hall's job was to sort and handle mail on a run between Cincinnati and Norfolk, Virginia. He was injured en route by a falling stanchion in the mail car. He sued the Railway Company and the Express Company for damages. The case was removed to the United States District Court for the Southern District of Virginia. Verdict was had by the plaintiff in the amount of $18,500.00 against both defendants. Appeals were taken by both defendants.

On this appeal, the 4th Circuit Court (49 F. 2d 692) reversed the judgment because of prejudicial instructions given the jury and remanded for new trial.

The appellate court, however, stated in its opinion (p. 696):

"The uncontradicted evidence is that the plaintiff was employed and paid by the express company, but that he was loaned or furnished by the express company to the railway company and was engaged upon the latter's business at the time of his injury. The contract between the two defendants, with relation to the plaintiff's employment, if any written contract existed, was not introduced in evidence, but the proof shows that the express company merely furnished the men to operate the mail storage cars, and it had no supervision over the cars or over the work while it was being performed. On the contrary, the men, while so engaged, were considered '100% railway employees.' While the testimony on the point is not as explicit as it might be, there can be no doubt that for the purposes of this case the plaintiff must be considered as an employee of the railway company."

Subsequently a new trial was had.

At the conclusion of the evidence the trial court sustained Express Company's motion for dismissal as to it. Verdict for $25,000.00 for the plaintiff was rendered by the jury against the Railway Company. Appeal was taken by the defendant Railway Company. Plaintiff did not appeal from the order in favor of Express Company (57 F. 2d 1004).

The Circuit Court of Appeals held (syl. 4 and 5) as follows:

"Servant furnished by general employer to perform particular service for another under latter's control must be dealt with as latter's servant."

"Special employer, controlling employee and working appliances furnished by general employer, is liable for injuries to him because of neglect to perform master's duties."

[8] *Norfolk & W. Ry. Co., et al v. Hall,* 49 F. 2d 692; 57 F. 2d 1004 (4 C. C. A.)

The court stated in its opinion (p. 1008):

"A servant furnished by his general employer to perform a particular service for another under the latter's control is to be dealt with as the servant of the latter and not of the former. The special employer bears, not only the liability to third persons for injuries caused by the servant's negligence, but also the liability to the servant for injuries suffered by him from the neglect to perform the duties owed him by his master." (Citing cases).

"This rule applies when the general employer furnishes, not only the servant, but the appliances with which he works, if both are subject to the control of the special employer." (Citing cases).

Interesting, but true, the appellate court (57 F. 2d 1004) held, that upon the facts, Hall was actually in the employ of the United States Post Office Department since (1) the work he was performing was that of the Post Office Department, and (2) the right of supervision and control of his work was in the postal clerk in charge of the operation.

The Court reversed the judgment and in so doing stated:

"Nor is the railway company responsible for the negligent acts of the men who stored the car with mail at Cincinnati, if it be true, as the present record seems to indicate, that these men like Hall were the employees of the Post Office Department, furnished to it by the railway company in accordance with Regulation 1293 (2). That was the question decided in *Denton v. Yazoo & Miss. Valley R. Co.*, supra."

In *Malisfski et al v. Indemnity Ins. Co. of North America,*[1] Wernig Express Company hired out its truck and driver to the City of Baltimore. The Express Company truck was being used by the city for removal of snow. The driver was told to report to the Highway's Department and no further orders were given him by the owner of the truck, who likewise was the driver's general employer. The foreman of the snow removal job was an employee of the city and had control over the driver and truck, even to the extent of the number of hours worked.

The Indemnity Company had issued a liability policy on the truck to the Express Company. The City was named as an additional insured. Express Company paid the premium on the policy.

The omnibus clause was qualified by the following provision:

"'(c) to any employee of an insured with respect to any action brought against said employee because of bodily injury to or death of another employee of the same insured injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such insured.'"

Malisfski, a city employee, was injured as a result of the use of the truck. He instituted suit against the driver of the truck and obtained a judgment.

The Indemnity Company brought an action against Malisfski and others for declatory judgment exempting itself from liability under the liability policy it had issued. The Indemnity Company had judgment (46 F. Supp. 454) and the defendants, including Malisfski appealed.

The 4th Circuit court stated in its opinion (at p. 911):

"The crucial question with respect to the application of the omnibus coverage clause is whether the truck driver, in carrying on the work which resulted in Malisfski's injury, is to be considered an employee of the express company or of the city. If he was an employee of the express company and not of the city, liability for the injury rested upon the express company and the omnibus coverage clause would apply, since the injured man was not an employee of the same insured. If, however, he was an employee of the city, liability for the injury rested upon the city and the clause would not apply since the injured man also was an employee of the city, the same insured, and the case would fall within the provisions of exception (c) above quoted. Directly in point is the case of *Johnson v. Aetna Casualty & Surety Co.* 5 Cir. 104 F. 2d 22, 24, dealing with a like exception to the omnibus coverage clause."

and (p. 912)

"Coming then, to the question as to whose employee was the truck driver in the operation which resulted in Malisf-

[1] *Malisfski v. Indemnity Ins. Co. of North America,* 135 F. 2d 910 (4 C. C. A.)

ski's injury, we find that liability for the acts of the driver of a car or truck, who is employed by the owner but is serving a hirer at the time, has been the subject of many and sometimes conflicting decisions. See annotation 42 A. L. R. 1416 et seq. and cases there cited. The rule to be deduced from these is the rule ordinarily applied in determining whether a servant is to be deemed the servant of him for whom work is done or of an independent contractor, *i.e.,* he is the servant of him who has the right to control not merely results but the progress and details of the work and the manner in which it is done. If the driver is not subject to the control of the hirer of the vehicle in the performance of the work, he is deemed the servant of the owner, even though the hirer may have the power of directing him when and where to go and what to bring or carry."

The Circuit Court affirmed stating (p. 914):

"We think that any presumption that the truck driver remained the servant of the express company, the owner of the truck, has been met by the proof of the special circumstances of the case and that he should be held the servant of the city. At all events, the judge below has so found; and there is nothing in the record which would warrant us in disturbing his finding. It follows that the liability of the truck driver is not embraced within the omnibus coverage clause.

Thus it is seen that the fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the "Special Employee" of another who actually is liable for such servant's acts while performing the work of the borrowing master.

The lending employer's responsibility *cannot be extended beyond the limits of his work,* when his servant is lent to another to do the latter's job under the direction and control of the borrowing master. (*Standard Oil Co. v. Anderson,* supra).

In the hypothetical case related earlier herein, or any similar cases, it seems well established in the law that:

(a). The lending master is not liable because he continues to pay the loaned servant's wages.

(b). The lending master is not liable merely because he has furnished the equipment to be used in the work of the borrowing master by the loaned or "Special Employee."

(c). The lending master is not liable when the work which is being performed is not the lending master's work and control has passed to the borrowing master.

The Headlines Warn of the Future

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MASSACHUSETTS DANGEROUSLY CLOSE TO STATE FUND FOR AUTOMOBILE COVERAGE! WHICH ROAD FOR THE UNINSURED MOTORIST? NEW YORK, NEW JERSEY, WISCONSIN, CALIFORNIA APPOINT COMMITTEES TO STUDY COMPULSORY AUTOMOBILE INSURANCE. SASKATCHEWAN ADOPTS COMPENSATION PLAN FOR MOTOR VEHICLE ACCIDENT VICTIMS. CANADIAN PROVINCES ADD IMPOUNDMENT AND UNSATISFIED JUDGMENT FUNDS TO MOTOR VEHICLE LAWS.

These and similar headlines of recent times are of importance to the lawyer engaged in practice in the automobile field of law because of the great volume of legal work that has grown out of the use of motor vehicles. Whether the amount of such legal business increases, remains the same, or is materially diminished, is involved in such headlines—and the type of

legislation adopted to answer the problems arising out of the use of motor vehicles will largely determine the amount of automobile legal business that will remain for the lawyer in private practice.

The purpose of this paper is to outline the problems that have been raised, the legislative and non-legislative actions that have been taken to date to solve the problems growing out of the use of motor vehicles and considerations now being given to answers to be made to such problems. This paper will outline the facts as we have found them and leave it to you to come to your own conclusions as to what the answers should be.

The post war economic effects of motor vehicle accidents to the nation as a whole and the individual in particular have been terrific. It presents a most serious social problem as well as a problem of judicial administration. The 1951 edition or "Accident Facts" published by the National Safety Council shows that a total of eight million, three hundred thousand motor vehicle accidents occurred in 1950, involving one million, two hundred fifty thousand injuries with thirty-five thousand fatalities and fifteen million, nine hundred fifty thousand drivers, or substantially one-tenth of the present population. The cost of these accidents is estimated at three billion, one hundred million dollars, or figures seldom used except by those concerned with the federal budget. Motor vehicle accidents are big business and influence people.

The automobile became a major part in the lives of people after World War I, which introduced the principle of mass production and made it financially possible for the average individual to become the owner of a motor vehicle. The economics involved became a problem shortly thereafter. The primary problem was, "Who did what to who," and how were the damages going to be paid growing out of motor vehicle accidents.

A comprehensive study of the problems involved was undertaken by a Committee to Study Compensation for Automobile Accidents under the guidance of Columbia University Council for Research in the Social Sciences, which committee published its report, commonly referred to as the Columbia Report, in 1932. The investigation of the committee extended over a period of two years.

The judicial administration problem referred to above grows out of the operation of the fault principle of liability with respect to motor vehicle accidents. The Columbia Report pointed out the following criticisms of such principle:

> " . . . (1) the imposition on the plaintiff and on the defendant of the burden of producing evidence as to fault, although the accident itself has often hindered or prevented them from obtaining witnesses; (2) the difficulty of ascertaining the facts sought, even where the best evidence is obtainable, because witnesses who are neither trained nor prepared to observe cannot, after the lapse of months or even years, enable a jury, which has no training in fact finding, to fix the blame for an accident caused by events which succeeded each other in the space of a few seconds; (3) the impossibility of fixing the damages accurately since there are no recognizable criteria of the value of pain or of life or of disability; (4) the delay, especially in the large cities, caused by waiting for trial, and aggravated in some cases by appeal; (5) the heavy cost of attorney's fees which generally range from 25% to 50% of the amount recovered; (6) the financial irresponsibility of many motorists who cause accidents; (7) the burden cast upon the courts and the consequent congestion of all judicial business in large cities due to the volume of motor vehicle accident litigation."

The immediate pressure being applied to the general problem stems from the financially irresponsible motorist and the uninsured motorist.

Three means have been used in an attempt to answer the general problems involved: (1) through legislative action, (2) through the courts, and (3) action taken by the insurance industry.

Legislative Action

Legislative action to answer the general problem has included: (1) financial responsibility laws, safety and security types; (2) Massachusetts compulsory insurance law; (3) unsatisfied judgment fund laws of Canadian provinces; and (4) Saskatchewan automobile accident compensation act.

(1) (a) *Financial Responsibility Laws, Safety Type.* Financial responsibility legislation of the safety type was sponsored by the insurance industry as a possible solution to some of the problems involved and to meet the threat of compulsory automobile

insurance. (It is reported that between 1920 and 1930 bills providing for compulsory insurance were introduced in the legislatures of more than 40 states). This type of financial responsibility legislation which was first adopted in Connecticut in 1925 sought to accomplish two primary purposes: (1) to aid accident prevention, and (2) to make it possible for more accident victims to recover their losses as such legislation would encourage more motorists to become insured and thereby become financially responsible at least to the extent of the limits of the insurance policy carried by the negligent motorist. The chief criticism that developed under this type of legislation was that the driver was entitled to one accident before he had to prove he was financially responsible. The driver was free to operate his vehicle until he became involved in an accident in which personal injury or property damage above the statutory limit was inflicted. Upon the happening of the contingency or conviction of a serious traffic violation the owner then had to prove that he was financially responsible to pay judgments up to statutory amounts for accidents arising in the future (usually $5000/10,000/1000 limits). Failure to give such proof and in many jurisdictions failure to pay a judgment arising out of the "first bite" accident led to the revocation of the driver's license or motor vehicle registration.

(b) *Financial Responsibility Laws, Security Type.* The safety type of law did not bring about the desired results and the next legislative step was enactment of the Security Type of Financial Responsibility Law in New Hampshire in 1937. This type of law requires the posting of financial responsibility upon the happening of a motor vehicle accident involving personal injury or property damage above the statutory limit to show ability to pay damages up to statutory limits, usually $5000/10,000 bodily injury limits and $1000 property damage limits. This type of law greatly increased the number of motorists who carried automobile coverage, thereby making them financially responsible *before* an accident occurred—to such an extent that between 75% and 85% of the registered motor vehicles in most states having the Security Type of law are insured, with New York estimated at 95% of registered vehicles.

The chief criticisms of the Security Type are much the same as were directed at the Safety Type, that is, (1) the law still permits the "one bite" accident and only *after* the accident is the offender required to either quit driving or post security, and (2) the irresponsible motorists continue without insurance even though that may be only 5% of the registered cars as in the case of the State of New York. This has led to further pressure for further improvement of the financial responsibility laws and there is the suggestion that the "Impoundment" and insurance company operated "Unsatisfied Judgment Fund" plans be added to the law.

The "Impoundment" plan contemplated the impoundment of the car of the driver until financial security is posted as required by the law so that he cannot drive his car in violation of law, *i.e.*, before posting security under the law, thereby eliminating one of the main criticisms growing out of the enforcement of the law.

The insurance company operated "Unsatisfied Judgment Fund" contemplates that a fund will be created from which payments are made to any person obtaining a judgment, otherwise uncollectible, for damages due to personal injuries or death caused by a motor vehicle. The fund would be created by requiring each motorist desiring to obtain license plates for a motor vehicle or a driver's license to furnish a certificate showing payment of $1.00 or such amount as the law may require to an insurance company authorized to do business in the state, which amount would be paid by the insurance company into a central Unsatisfied Judgment Fund to be administered by all participating companies. The Unsatisfied Judgment Fund would take care of judgments within statutory limits when insurance was not in effect or when the judgment cannot otherwise be satisfied out of assets of the judgment debtor. The reciprocity section of the model financial responsibility law could take care of cases involving non-residents of states having a similar law. The fund would also cover judgments in hit-skip cases. The fund would have the right of subrogation against the judgment debtor so as to eliminate any thought that it is not necessary to carry the standard automobile coverage. This would leave the administration of motor vehicle insurance in the hands of private industry and maintain the status quo of the legal profession with reference thereto.

2. *Compulsory Motor Vehicle Insurance.* Compulsory motor vehicle insurance

has been one of the means on the agenda of answering the general problems growing out of the operation of motor vehicles ever since such became a problem in 1920. During the legislative year 1950 there were compulsory automobile insurance bills of various types introduced in 22 of the 44 state legislatures and not one was adopted. A host of similar bills have been before various state legislatures since 1920 and only the legislature of the State of Massachusetts has seen fit or deemed it in the public interest to adopt such a plan. Although the Massachusetts law has been in effect since 1927 no other state has followed its lead.

The Massachusetts law requires the private motorist to furnish a certificate of insurance to meet the statutory requirements on making application to register a motor vehicle. The policy must cover the insured and any person responsible for the operation of the insured vehicle with the consent, express or implied, of the owner. The main advantage of the law is that it has eliminated the uninsured motorist within the statutory limits. Not all motor vehicle accidents are covered—such as vehicles not registered in the state and in the state for not more than 30 days, vehicles on the highway in violation of law or where stolen.

The chief criticisms of the law grow out of the rate making practices. The law authorizes the annual fixing of premium rates by the Commissioner of Insurance. The motorists in the more populated parts of the state, who have had their premium rates substantially increased, complain that the rates are too high, whereas, the insurance carriers complain that the rates are too low and are subject to political pressure. The insurance carriers claim they are sustaining substantial losses. The National Underwriter for November 8, 1951 reported as follows with reference to the Massachusetts Association of Insurance Agents meeting held during that week:

"Boston—To get a realistic notion of what compulsory automobile insurance does to an entire business and an entire state, the observer would find it profitable to spend a few days in Massachusetts at about the time the new auto liability rates are to be issued. Massachusetts Assn. of Insurance Agents held its annual convention here at this point in history last week. Much of the agents' discussion dealt with problems of handling the automobile line which compulsory has multiplied greviously.

"But all over Boston there was an attitude of breathless waiting for the insurance department to fire its pistol so that the race against time—to get in registrations, find insurance coverage, and complete a number of other details—could start. Agents were putting aside other considerations for the next few weeks, or rushing to clear desks for the year end gallop.

"No P. D. L. In one office a telephone conversation ended like this: We couldn't do anything about the creased fender, the other driver didn't have property damage liability coverage.

"Even Commissioner Sullivan, who spoke briefly at the agents' banquet, plaintively noted the unenviable position in which he found himself on rates, with 1,250,000 eyes turned in his direction. The commissioner is the villain in the piece, he commented. There is an atmosphere of distrust and suspicion connected with the promulgation of the rates, as if a great calamity were about to descend on Massachusetts motorists. And this occurs every year. He said he had no fears and a clear conscience, but indicated that this was an experience with which he was wholly unfamiliar and that had some very unusual aspects.

"This year's promulgation is perhaps a little different, at least in intensity of interest, than it would be in a normal year, if there were a normal year under compulsory. The conversation of agents indicated that some casualty companies are waiting for the rates to make a final decision as to whether they will write automobile in Massachusetts next year at all. If the increase is about the 20% asked, they will stay; if not, they will go. Some are cutting commitments for 1952, up to 50%, or by dollar volume, and many others are watching underwriting more closely.

"State Fund Bills. Two or three legislators are said to be carrying state fund bills around in their pockets, ready to pop them into the legislative hopper if the new rates are much higher and even resort to injunction to stop the new ones. The commissioner is said to be waiting till the legislature adjourns before firing the signal gun.

"This is an odd atmosphere in which to conduct a business; many agents wonder if it hasn't deteriorated into some-

thing less and something a good deal worse than almost any other business."

Other criticisms of the law have been that there was a tendency to increase accident frequency; that it does not apply to out-of-state drivers or beyond the boundaries of the state or accidents occurring on private property, such as garages, service stations, private parking places and private driveways and willful violators of the law; does not provide property damage coverage; and that many motorists are inclined to comply only with the statutory requirements and do not carry medical payment coverage and limits in excess of those required by the statute.

Those who favor the Massachusetts compulsory automobile insurance law contend that the plan can be made applicable to out-of-state drivers by a reciprocal provision, assuming such a law was adopted generally by the states, that enforcement is a problem under any law, that rate making need not be a "political football" and that the assigned risk plan should permit the companies to apply sound underwriting requirements to undesirable risks.

3. *Canadian Type of Unsatisfied Judgment Funds.* The unsatisfied judgment fund plan which has been adopted in the Canadian Provinces of Alberta, British Columbia, Manitoba, Ontario and Prince Edward Island and recently in the State of North Dakota was designed to eliminate the criticism of the financial responsibility type of law that the judgment debtor was not financially responsible in every case. The plan in general provides that a state fund be created from which payments within statutory limits are made to any person obtaining a judgment, otherwise uncollectible, for damages due to personal injuries or death caused by a motor vehicle. Usually such payments are limited to $5000/10,000. The fund is created from payments of $1.00 or such other amount as is provided by the law by applicants for the registration of a motor vehicle or a driver's license. Those favoring this type of legislation contend that it takes care of the claimant injured by a non-insured, irresponsible driver who is unable to post security, while those opposing the plan contend that it is contrary to the philosophy that those who are at fault should bear the cost of their own negligence, which is the basis of most state rating laws.

4. *Saskatchewan Automobile Accident Insurance Act.* The Columbia report of 1932 recommended a compensation plan for victims of automobile accidents similar to workmen's compensation laws, to solve the social and judicial problem, it being contended that such a plan would eliminate the unsatisfactory and uncertain method of claim enforcement as well as cut congestion of court dockets growing out of automobile cases. Under such a plan the automobile accident victim would be compensated regardless of fault and it is contended that only in hit and run cases and where the vehicle was driven without the owner's consent would the plan fail to assure some compensation for the victim of a motor vehicle accident, assuming such a plan was generally adopted in the states with a reciprocity provision. No state of the United States has adopted such a plan but the province of Saskatchewan enacted such a plan in 1946.

The act provides compensation against loss resulting from bodily injuries sustained in an accident while driving or riding in a motor vehicle in Saskatchewan or as a result of collision with or being run over by a motor vehicle *regardless of fault.* However, the act is not all inclusive as it does not cover a person injured: (1) where his conduct amounts to a criminal offense; (2) where he drives without a license or is in a vehicle not properly registered; and (3) where he rides on a part of the vehicle not designed to seat passengers or carry a load. The plan is operated under an exclusive state insurance fund. The plan contemplates full insurance coverage within statutory limits. An injured party may sue for negligence at common law and recover any judgment obtained less the amount of compensation which he received under the act. If the damages at law exceed the compensation received, the motorist is covered up to but not in excess of $5000/$10,000 limits. The benefits and claim procedures are modeled after workmen's compensation plans. For example, death benefits are $3000 to the primary dependent and $625 to each secondary dependent up to a total of $10,000. $125 is allowed in all cases for funeral expenses. Weekly compensation ranges from $10.00 to $20.00.

From the standpoint of the practicing lawyer, it is reported that lawyers have been employed by claimants in only a very small percentage of cases except in respect to those involving death claims where filing suit has been considered a part of settling

the decedent's estate. It is also reported that no suit was brought against the Government Insurance Office during the first three years of operation under the act.

The act has not eliminated uninsured drivers or violators of the law on the highways in the Province as there were 259 convictions against persons operating unregistered vehicles and 458 convictions for failure to have a driver's license during the license year 1948-1949.

Actions Through the Courts

The decisions of the courts in tort cases in recent years have shown a trend of liberality with respect to questions of coverage under insurance policies, rules of evidence and amount of judgments, with a result that more and more persons involved in motor vehicle accidents have been permitted to recover in such cases. For example, it is a very unusual case where the court directs a verdict in favor of the defendant in an automobile case. For all practical purposes it is the policy of the trial judge to submit the case to a jury for judgment. Liberality in determining questions of agency and the growth of the family purpose doctrine has also had a material effect in increasing the number of people who have been permitted to recover in automobile cases. Add to this the policy of the insurance industry to make some settlement in practically all bodily injury cases and you have a very real contribution toward answering some of the problems growing out of congestion of court dockets and extending recovery to more and more people involved in motor vehicle accidents.

The judicial problems from the standpoint of whether or not a person may recover damages sustained in a motor vehicle accident grow out of the long accepted principle of the common law that the injured party may recover only where the offender is negligent or at fault; further that the injured party may not recover if he himself contributed to his own injuries. There has been no fundamental change in the legal principle that there shall be no liability without fault. The liberal trends noted above and the tendency of juries to compare negligence have served to keep this fundamental legal principle up to date, so to speak, and there does not appear to be any particular demand on the part of the public for a change. Any agitation for a change from this principle to that of compensation appears to come from so-called social planning and what that particular type of person thinks is for the best good of the public. It is the guess of the writer that if you picked ten persons at random and asked each of them whether he thinks a person should be paid for damages sustained in an automobile accident when that person was at fault, all ten answers would be "No."

The automobile is still a thing that is under the exclusive control of the driver. It is not like the case of the workman who must work on premises that are under the exclusive control of the employer. There is a fundamental difference in the thinking of the average individual relating to the accident to the workman and the accident to a person involved growing out of the use of a motor vehicle and this is so in spite of the social and economic problems growing out of automobile accidents. True, you are just as dead if killed at a machine in the employer's shop as you are if killed in an automobile accident. But the man in the street still thinks in terms of the death in the automobile accident as to whether the decedent brought about his own death and, if so, there should be no recovery.

The insurance industry has gone a long way toward providing minimum payments even in cases where there is no fault to make sure that basic needs such as hospital and funeral expenses or a substantial proportion thereof are paid. Furthermore, a motorist can obtain medical payment coverage at a very nominal cost which will guarantee payment of medical and hospital bills up to a maximum of $2000 for each person in the automobile. The cost for such coverage is $6.00 per year.

Voluntary Action by the Insurance Industry

In addition to the voluntary action by the insurance industry just referred to in connection with the judicial problems involved, the insurance industry has made a very determined effort to answer the social and economic problems involved. It has extended and broadened coverage under the automobile policy so that the general exceptions to coverage are: (a) where the automobile is insured as a private passenger automobile but is used as a public or livery conveyance; (b) under property damage, bodily injury and medical payment coverages with respect to liability assumed by the insured under any contract or agreement; (c) under property damage and bodily injury coverages where the au-

tomobile is used for the towing of a trailer owned or hired by the insured and not covered by like insurance in the company; and (d) under bodily injury and medical payment coverages for bodily injuries or sickness, disease or death of any employee of the insured while engaged in the employment other than domestic of the insured if benefits therefor are provided under any workmen's compensation law.

Admittedly, the efforts of the insurance industry have been to preserve the private enterprise method of doing business rather than placing the insurance business under state or government insurance plans. Such effort has been in the public interest as our industrial history has proven that the private competitive enterprise method of doing business results in more goods and services to the public at less cost.

In conclusion, we would suggest that each practicing lawyer make it a must to do the necessary research to come to a conclusion as to what he thinks is the proper means of meeting the social, economic and judicial problems arising out of the operation of motor vehicles and how the public interest can best be served. He has a very real personal interest in the kind, type and content of legislation that may be adopted in connection with the general problem. His own personal best interest is commensurate with the best interest of the public and for this reason he should be well prepared on this subject if he desires to serve his own best interest and that of the public. I am attaching hereto for the convenience of any who desire to do some research a bibliography containing various articles, presenting the various pros and cons of the problems under discussion. We thought this would be of more benefit than a detailed citation of authorities in support of the various facts given in this paper.

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Recent Developments In The Law On Loan Receipts

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THE April 1949 issue of Insurance Counsel Journal contained an article entitled *An Examination of the Present Status of the Law on Policy Loans.* The author of that article (Forrest S. Smith, Jersey City, N. J.) discussed the use of loan receipts as a device for "overcoming some of the now present difficulties which subrogation entails." The purpose of the present article is to summarize and discuss several important developments in the law on loan receipts which have occurred since the publication of Mr. Smith's article in this Journal. We shall be concerned solely with the use of the loan receipt as it relates to subrogation actions, more particularly as a device used to circumvent the real party in interest statute.

The recent case of *Cleveland Paint & Color Company v. Bauer Manufacturing*

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Company, 155 Ohio State 17, 97 N. E. 2d 545 (March 7, 1951) is of considerable interest. The Bauer Manufacturing Company, a manufacturer of ladders, sold one of its ladders to The Cleveland Paint & Color Company, a retailer engaged in the sale of painters' supplies. The retailer resold the ladder to an individual named Hooker, a painting contractor. While Hooker was using the ladder one of the rungs broke, as a result of which he was thrown to the ground and severely injured. Hooker brought suit for his injuries against the retailer which tendered defense of the suit to the manufacturer, which in turn refused the tender. Subsequently, Hooker obtained a judgment against the retailer, which judgment was paid. The retailer then brought action against the manufacturer for reimbursement. The manufacturer's answer contained two defenses, the first being in substance a general denial. The second defense alleged that the plaintiff retailer was not the real party in interest; that the plaintiff was insured "against loss or damage in excess of $50 for damages imposed by law and arising out of bodily injuries sustained by any person incurred by reason of the hazards enumerated in said policy of insurance." It was further alleged that following the rendition of the judgment against the retailer, its insurer paid to it the amount of the judgment as required by the policy of insurance, and that the retailer then repaid to its insurer the sum of $50 pursuant to the deductible provision of the policy. The answer further alleged that when the insurer paid to the plaintiff retailer the sum equivalent to the amount of the judgment rendered against it in favor of Hooker, the plaintiff executed and delivered to its insurer a loan receipt wherein it was recited that the sum equivalent to the amount of the judgment was received by plaintiff "as a loan and repayable only to the extent of any net recovery which the plaintiff might make against the defendant." It was alleged that the loan receipt further recited "that the plaintiff thereby pledged any such net recovery to the said insurer, and agreed to enter and prosecute suit against the defendant to recover on account of said claim for said loss incurred by plaintiff in consequence of the entry of the above judgment with all due diligence, suit to be at the expense and under the exclusive direction and control of said insurer." The manufacturer's answer further alleged that the sum paid by the insurer to the retailer was not a loan but a payment and that as a result of the payment the insurer was subrogated to all claims of the retailer against the manufacturer except to the extent of $50, and consequently the insurer was a real and necessary party in interest under the real party in interest statute. Plaintiff retailer demurred to the second defense on the ground the defense was "insufficient in law." The plaintiff retailer contended that as a result of the loan receipt its insurer was not subrogated to any rights against the defendant manufacturer and that it (the retailer) was the only real party in interest in the action against the manufacturer. The trial court overruled the demurrer. The retailer elected not to plead further, and the court dismissed the petition. The intermediate appellate court affirmed the ruling of the trial court and the retailer appealed to the Ohio Supreme Court. The latter court affirmed the rulings of the lower courts. The Supreme Court, in its syllabus, held:

> "Where an insurer pays a claim under an indemnity policy indemnifying the insured against liability arising from his sale of a defective instrumentality, but instead of taking a receipt and release the insurer takes from the insured a so-called loan agreement which recites that insured has received a specific sum as a loan to be repaid only from such recovery as may be had from the manufacturer of the alleged defective instrumentality, the transaction is not a 'loan,' notwithstanding its designation as such, but is a 'payment' subrogating the insurer to that extent and affording to the manufacturer, who is sued by the insured alone, a defense under the statute requiring that every action be prosecuted in the name of 'the real party in interest.'"

The court in its opinion pointed out:

> "In the instant case, the liability of the insurer to the plaintiff was absolute and the latter was entitled to payment without resort to a loan."

A contrary result was reached by the Minnesota Supreme Court in *Blair v. Espeland*, 231 Minn. 444, 43 N. W. 2d 274 (June 30, 1950). The case arose out of a collision between automobiles operated by the plaintiff and the defendant. Three passengers in the defendant's automobile sued the plaintiff for damages, and recovered judgments which were paid by the

plaintiff. The plaintiff then sued the defendant for contribution in accordance with Minnesota practice. In his answer the defendant denied negligence and alleged that at the time of the accident plaintiff was protected by a liability insurance policy, and that under its terms, in the event of any payment under the policy, the insurer would be subrogated to all the insured's rights to recovery. The answer further alleged that plaintiff's insurer paid the judgments above described and that by reason thereof the insurer was and is the real party in interest and the sole owner of plaintiff's alleged cause of action.

The plaintiff moved to strike from defendant's answer the allegations with regard to insurance, payment, subrogation and real party in interest and supported his motion with an affidavit stating that:

> "Plaintiff paid the judgments with his own personal check; that the money which paid these judgments was furnished by plaintiff's insurer under a loan receipt agreement with plaintiff; that under the terms of the loan receipt the loan was repayable only to the extent of any net recovery plaintiff might have against any party because of the collision, plaintiff pledging as security for such repayment any amount he might recover in such suit; that no interest would be required of plaintiff on said loan; and that plaintiff would prosecute such suit with due diligence at the expense and under the exclusive direction and control of the insurer."

In a counter affidavit submitted by the defendant it was stated that the insurance policy in question contained no provision authorizing loans from the insurance company to the plaintiff or requiring the insured to execute any loan receipts as an alternative to the duty of the company to pay, and that the affiant believed the purported loan to be a device intended to cloak the real payment of the judgments by plaintiff's insurer.

The court sustained the Motion to Strike and held that the plaintiff was the real party in interest. In its opinion the Court said:

> " 'Loan receipts' used as a device to permit the contribution action to be brought in the name of the insured rather than in the name of the insurer, who, except for the 'loan receipt' agreement, would be the real party in interest, are not new to the law. . . ."
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> "The intent of the parties to the 'loan receipt' agreement is clear. It was entered into because it enables the insured to bring the action in his own name and permits the insurer, who will benefit if a recovery is had, to remain hidden from view. . . . "

The decisions of the Ohio and Minnesota Courts exemplify the conflict of authority which exists among different jurisdictions. The conflict results from divergent interpretations given by the courts to the real party in interest statute.

The Ohio real party in interest statute, Ohio General Code Section 11241, provides: "An action must be prosecuted in the name of the real party in interest. . . ."

The Minnesota real party in interest statute, Minnesota Statutes, 1945, §540.02, provides: "Except when otherwise expressly provided by law, every action shall be prosecuted in the name of the real party in interest. . . ."

A review of the cases in the two jurisdictions clearly shows that the Ohio Court, in interpreting the statute, has looked through form to substance and has insisted that the pleadings should reveal the actual interest of the plaintiff and should indicate the interests of any others to the claim. On the other hand, the Minnesota Court has held, generally speaking, that the real party in interest statute is complied with so long as the defendant is protected against a double recovery. In *Blair v. Espeland* supra, the Minnesota Court said:

> " . . . A judgment in this case against him would be a protection against another suit by plaintiff's insurer, as plaintiff is the party in legal interest. The arrangement between plaintiff and his insurer cannot affect defendant financially. Therefore, he need not be concerned. There is no danger of more than one recovery. . . . "

The position taken by the Ohio Court, in construing the real party in interest statute, is consistent with the recent pronouncement of the United States Supreme Court in its construction of the federal real party in interest rule. Rule 17A of the Federal Rules of Civil Procedure provides:

> "Every action shall be prosecuted in the name of the real party in interest. . . . "

In *United States v. Aetna Casualty and Surety Co.*, 338 U. S. 366; 70 S. Ct. 207, a case involving subrogation claims brought by a number of insurance companies against the United States, Mr. Chief Justice Vinson, referring to the real party in interest requirement of Rule 17A stated:

"The pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim."

The Ohio Court's interpretation of the real party in interest rule is more realistic than that of the Minnesota Court and similar authorities. The real party in interest rule is a valuable right given to defendants. It has a broader purpose than merely to protect a defendant from a double recovery. Its purpose is to bring together in suit, parties whose rights and interests are actually under consideration. The real party in interest rule is a cornerstone upon which many other rights are based. It affects a defendant's right of interrogation of jurors and challenges for cause. It affects the persons whom a defendant has the right to call for cross-examination. It affects the right of a defendant to remove a case to Federal Court on the ground of diversity of citizenship of the parties. If not enforced, it would serve to hide from a defendant the fact that he might have a set-off or counterclaim against the real, but hidden party in interest. The composition of a Court hearing a particular case might also be affected if the rule was not enforced. If the real parties in interest in a case are not the parties of record, a judge might be placed in the embarrassing position of deciding a case in which unknowingly he had a personal interest.

It is argued, by the proponents of the Minnesota rule, that if a plaintiff's insurer is required to appear as a party plaintiff in an action over against an alleged wrongdoer, that the defendant is given a one-sided strategic advantage. The Minnesota Court, in *Blair v. Espeland* supra, said:

"The insurer here is of the opinion, whether justifiably so or not, that its chances for recovery against an individual in an action for contribution are far less than if the action were brought in the name of an individual. As every car owner is required to carry liability insurance, it is fair to assume that defendant's insurer is the real party in interest in the defense of this action, and is not under the assumed disadvantage of having to appear under its own name. In *Hayward v. State Farm Mut. Auto. Ins. Co.*, 212 Minn. 500, 505. (14 CCH Automobile Cases 1048) 4 N. W. 2d 316, 319, we presumed that, 'For strategic reasons, plaintiff's counsel probably wanted no insurance company apparent on their side of the case.' So here, for strategic reasons, plaintiff's insurer prefers not to have its name appear as a party litigant, and for the same reason defendant's insurer prefers to have it appear."

It is certain that the existence of rules preventing the disclosure of the fact that a defendant is wholly or partly insured is not a justifiable reason for permitting another insurance company, in violation of the real party in interest statute, to prosecute its action for recovery upon a subrogation claim in someone else's name as plaintiff. A defendant's insurer, except in a very few states, cannot be made a party defendant in the first instance, whereas, on a subrogation claim, the plaintiff's insurer is the real and beneficial prosecuting party. Again the real party in interest statute *applies only to plaintiffs.*

It is further urged by the proponents of the Minnesota rule, that a defendant should be required to face in court the party whom he is alleged to have wronged. That argument is the equivalent of urging that the original assignor of a claim, who of necessity always is the party whom a defendant tort feasor is alleged to have wronged, should always be the plaintiff in a suit on the claim. It is the equivalent of arguing that the "face in court" presented to the defendant should be that of the assignor although the real party in interest is the assigne. It just as logically could be argued in contract cases that a debtor should face in court the man who loaned him the money, rather than the creditor's assignee. It has long been established that the assignee of an ordinary chose in action cannot sue in the name of his assignor over the objection of the defendant, but, as the real party in interest, must prosecute the action in his own name as plaintiff.

The proponents of the Minnesota rule argue that the mere execution of a loan receipt effects a valid loan and prevents an assignment of the claim to the insurer.

Where an insurer is absolutely liable[1] on a claim it strains credulity to say that the mere execution of a typical loan receipt can change a transaction from a payment to a loan with the result that the insurer is not subrogated to the claim against the alleged wrongdoer. The transaction in substance remains a payment. Merely attaching a loan label to the transaction cannot alter its true nature. It is permissible for one to label a black cow white, but regardless of the label the cow remains black. An insurer's position that because it has labeled the transaction a "loan," therefore it must be a loan, cannot be supported by authority or logic. Such a position is reminiscent of the society so deftly satirized by Lewis Carroll:

> " 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more or less.'
>
> 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
>
> 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'
>
> Alice was too much puzzled to say anything. . . . "
>
> —*Through the Looking Glass.*

A court is entitled to look at the substance of a transaction and not just its form.[2] There are many historic examples of the rule that a court will regard the substance of a transaction, rather than its form, and will not be bound by the label used by the parties. Two of them are in the field of mortgages and conditional sales. Where a debtor gives his creditor an instrument which in form is a deed absolute and actually is intended by the parties to be a deed absolute, courts have for centuries nonetheless held the deed to be but a mortgage, where given as security for an obligation. In the law of conditional sales, countless instruments designated as "leases" or "bailments" or "options" have nonetheless been judicially held to be conditional sales and subject to the recording statute. Where an insurer, which is absolutely liable to an insured, makes a payment in the amount of the loss the transaction is in substance a payment in spite of the "loan" designation. It is conceded by all that if the transaction is a payment, the insurer is subrogated to the claim.

If, as a matter of policy, it is felt that fairness demands the suppression of the fact that an insurance company has an interest in a subrogation action the remedy is one for the legislature. In New York, where the loan receipt has had a very confused history in the courts, the legislature recently amended the real party in interest statute (Section 210 New York Civil Practice Act) which now provides:

> "Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, an insured person, corporation, joint-stock association or other unincorporated association which has executed to his insurer either a loan or subrogation receipt, trust agreement, or other similar instrument, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted."

Thus, in New York, the status of the loan receipt has been clarified as a result of the amendment to the real party in interest statute. It is submitted that in other jurisdictions, where the loan receipt is used as a device for circumventing the real party in interest statute, legislative authority will in all probability be found necessary.

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[1] We are not concerned in this article with situations where the insurer has only a contingent liability. An illustration of this type of case is *Luckenbach v. McCahan,* 248 U. S. 139. It is conceded that the loan receipt may have a definite function in cases where an insurer's liability to its insured is contingent—situations where an insured has no right to compel payment by the insurer.

[2] *Orlean-Parish v. New York Life Insurance Co.,* 216 U. S. 517.

Williams v. Union Central Life Insurance Co., 291 U. S. 170.

Stewart v. Welsh, 41 O. S. 483.

Current Civil Defense Legislation

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DURING World War II many states enacted civil defense legislation which created state defense councils and which authorized cities and towns to establish local organizations for civil defense. These state defense councils were concerned with planning for state-wide protection against enemy attack and they acted as advisory boards to assist the various governors in preparing rules and regulations for local civil defense organizations to follow. The local organizations were in direct operational control of the various civil defense workers, such as air raid wardens, plane spotters, auxiliary firemen and policemen, who carried on the civil defense program of World War II.

Upon the end of the shooting war in 1945, this army of civil defense workers was disbanded. Furthermore, most of the legislation which authorized these state civil defense organizations died a natural death or was repealed because of the cessation of hostilities, so that now only Arizona, Mississippi, Missouri and Nebraska retain their World War II civil defense statutes without change. However, the post war breakdown of relations with Russia, plus the tactical problems presented by the possibility of atomic attack, all climaxed by the war in Korea, has caused 39 states and the District of Columbia and Hawaii to enact new civil defense legislation during the past two years. Only five states have no civil defense legislation at all, either newly enacted or as a residue of World War II legislation.

This new civil defense legislation is an outgrowth of the experience gained both here and abroad during the war, and also reflects the studies made by federal authorities since the war. A summary of these studies is contained in the legislative history of the Federal Civil Defense Act of 1950, Act Jan. 12, 1951, Ch. 1228, 64 Stat. 1245, as outlined in House Report 3209. According to this summary, these studies culminated in the following recommendations made by the Office of Civil Defense Planning, as established by the Secretary of Defense in 1948:

"1. A National Office of Civil Defense, with a small but capable staff to furnish leadership and guidance in organizing and training the people for civil defense tasks.

2. Basic operational responsibility to be placed in states and communities, but with mutual assistance plans and mobile supporting facilities for aid in emergencies.

3. Maximum utilization of loyal volunteers, existing agencies and organizations, and all available skills and experiences.

4. Well organized and trained units in communities throughout the United States, its territories and possessions, prepared and equipped to meet the problems of enemy attack, and to be ready against any weapons that an enemy may use.

5. Intensive planning to meet the particular hazards of atomic or any other modern weapons of warfare.

6. A peacetime organization which should be used in natural disasters even though it may never be used for war."

After the functions of the Office of Civil Defense Planning were turned over to the National Securities Resources Board, these recommendations for a national civil defense plan were incorporated into a report to the President entitled "United States Civil Defense," NSRB Document 128, dated September 8, 1950. The Federal Civil Defense Act of 1950 was then drafted to carry out the federal responsibilities outlined in this report. At the same time, a Model State Civil Defense Act was prepared for submission to the states to enable them to carry out their responsibilities under the national plan. This model bill was the basis for many of the state civil defense acts passed in the 1950 and 1951 state legislative sessions.

The Federal Civil Defense Act of 1950 creates a Federal Civil Defense Administration in the federal government with broad powers to plan and to coordinate the national civil defense effort as outlined in the United States Civil Defense Report,

including the following: to prepare national plans and programs for civil defense; to coordinate the civil defense efforts of other federal agencies; to disseminate warnings of enemy attack to the civilian population; to study the various methods of resisting and treating the effects of attacks; to establish training programs; and to disseminate civil defense information to the public.

Of particular importance to the various states is the power of this federal agency to assist and encourage the states to enter into compacts for mutual aid. The Federal Civil Defense Act of 1950 grants the consent of Congress to such compacts among the states, and directs the Federal Civil Defense Administration to review the terms of these compacts in order to obtain uniformity among them and to achieve conformity with the national plan. In addition, provisions are made for financial assistance to the states by the federal government to carry out state duties under the national plan.

As indicated above, the basic operational responsibility for conducting the civil defense program is placed upon the states, and the states in turn must delegate much of this responsibility to well organized and trained units in the various local communities. Accordingly, the civil defense acts adopted by the various states to conform with the national plan call for planning and coordinating at the state level, but delegate operational control as much as possible to the various cities and towns.

On the state as well as the national level, post war civil defense legislation and organization is much more explicit and detailed than it ever was during World War II. However, at the local level the pattern of World War II civil defense organizations has been retained. The civil defense worker of 1951 would probably see no difference between his present responsibilities and those of the war years, except that techniques for dealing with atomic attack and bacteriological warfare have to be learned. In addition, the possibility of large scale attacks saturating the resources of one community increase the importance of mutual aid between local communities and between the several states.

Those aspects of current state civil defense legislation which are of principal interest to casualty insurers and their counsel are: *First,* the degree of immunity from tort liability which is enjoyed by (a) governmental bodies and (b) the individual civil defense workers; *Second,* the effect of such immunities on existing workmen's compensation rights; and *Third,* the creation of workmen's compensation rights for the benefit of civil defense workers. The remainder of this article will attempt a comparative review of these aspects of this state legislation. Citations to the state civil defense statutes, and to the laws establishing workmen's compensation benefits for civil defense workers, are given in the appendix.

A.

IMMUNITIES

1. Governmental Bodies.

Most of the post war civil defense acts grant governmental immunity to the state or to its political subdivisions for injuries to persons or property arising out of civil defense activities. This immunity applies in most states regardless of whether the claimant is a civil defense worker or a member of the general public. A typical provision to this effect is Section 14 of the Alabama Civil Defense Act of 1951.[1] Other jurisdictions in which the governmental immunity under the local civil defense act is similar to that under the Alabama statute are as follows:

Connecticut	Louisiana	New York
Delaware	Maine	Pennsylvania
Dist. Columbia	Michigan	South Dakota
Florida	Montana	Washington
Georgia	Nevada	West Virginia
Hawaii	New Hampshire	Wyoming
Illinois	New Jersey	

[1] "Section 14. Immunity. (a) Neither the State nor any political sub-division of the State, nor the agents or representatives of the State or any political subdivision thereof, shall be liable for personal injury or property damage sustained by any person appointed or acting as a volunteer civilian defense worker, or member of any agency engaged in civilian defense activity pursuant to this Act. The foregoing shall not affect the right of any person to receive benefits or compensation to which he might otherwise be entitled under the laws of the State of Alabama or any political subdivision thereof or any Act of Congress.

(b) Neither the State nor any political subdivision of the State nor, except in cases of wilful misconduct. gross negligence, or bad faith, the employees, agents, representatives of the State or any political subdivision thereof, any authorized volunteer, auxiliary civilian defense worker, or member of any agency engaged in any civilian defense activity, complying with or reasonably attempting to comply with this Act, or any order, rule or regulation promulgated pursuant to the provisions of this Act, or pursuant to any ordinance relating to black-out or other precautionary measures enacted by any political subdivision of the State, shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity."

In California and Kansas this governmental immunity for civil defense activities applies only as to a claimant who is a civil defense worker. In Massachusetts, Ohio, Oregon and Utah, this governmental immunity applies only during emergencies as defined in the respective civil defense acts.

Special aspects of the governmental immunity in Colorado, Connecticut and Wisconsin are discussed in section 3. In these three states the governmental immunities, as well as the immunities of the individual civil defense workers, are affected by a right of reimbursement as to, or a duty to defend, civil actions arising out of civil defense activities.

Inasmuch as activities within the scope of these civil defense statutes are a governmental function to which the common law governmental immunity of the state or of its political subdivisions would ordinarily apply, these statutes have the effect of abrogating statutory waivers of governmental immunity in the relatively limited field of civil defense. In this respect, such statutes have not increased, and may have lessened the obligations of liability insurers of local units of government. Cases which are most likely to arise are cases involving motor vehicles and cases involving highway, street or sidewalk maintenance.

2. Civil Defense Workers.

As indicated by the Alabama statute mentioned above, the civil defense statutes of some states invest the individual civil defense workers with immunity from liability arising out of their activities in complying with the statute. This immunity generally applies, whether or not the civil defense worker is a volunteer or is paid for his services.

The following states provide some kind of immunity for civil defense workers:

Alabama	Kansas	North Dakota
Arizona	Louisiana	Ohio
Colorado	Maine	Oregon
Connecticut	Massachusetts	Pennsylvania
Delaware	Michigan	South Dakota
Dist. Columbia	Montana	Utah
Florida	Nevada	Washington
Georgia	New Hampshire	West Virginia
Hawaii	New Jersey	Wisconsin
Illinois	New York	Wyoming

This immunity for civil defense workers is not as complete as the governmental immunity, since most states condition the worker's immunity upon absence of personal misconduct. The basis for forfeiture of the individual's immunity differs in the various states and runs from "wilful misconduct," as in the Connecticut statute, to "wilful misconduct, gross negligence, or bad faith" as in the Alabama statute. Only in New York and South Dakota is there immunity of the individual civil defense worker without a proviso excluding negligence or wilful misconduct from the scope of the immunity.

From the point of view of the individual, the practical effect of the above differences under the statutes may not be too significant. If he has any claim to the immunity at all, he must be able to show that he was complying with the act. A negligent compliance with the act, on the other hand, may be held to amount to a non-compliance. Also, a state of facts constituting "gross negligence" under some of these statutes could be construed to be "wilful misconduct" under other statutes so that, regardless of the language of the proviso, the immunity would not apply.

From the point of view of the liability insurer of a civil defense worker, policy coverage and the duty to defend would be present even though a degree of negligence was alleged, but there might exist a limited defense to liability under the statute.

If wilful misconduct on the part of the civil defense worker will forfeit his immunity, then it is possible to have a case in which the worker stands deprived both of his tort immunity and also of the protection of his liability insurance—by reason of the element of intentional harm.

3. Indemnity of Civil Defense Workers.

As indicated in section 1, the immunity enjoyed by a civil defense worker in Colorado, Connecticut or Wisconsin is supplemented by a duty of defense and indemnity being assumed by the state. A summary of this aspect of the legislation follows:

Connecticut

The state attorney general is required to defend civil actions involving personal injury or property damage arising out of civil defense activities, whether the defendant is the state, a town, or an individual civil defense worker. Furthermore, the attorney general must defend a civil defense worker, even though the latter has forfeited the immunity afforded by the civil defense statute through "wilful misconduct." This duty of defense exists, whether or not the individual civil defense worker or the po-

litical subdivision happens to have liability insurance which would apply.

From the point of view of both compensation and liability insurers, the mere fact that the attorney general must enter an appearance and defend civil actions within the scope of their policies does not relieve them of their contractual duty to defend. On the contrary, this contractual duty has been complicated by the fact that some cooperative arrangement for the handling of such litigation will have to be made with the attorney general's office.

Colorado

All legal liabilities for death or injury to persons, or damage to property, arising out of compliance with the Civil Defense Act of Colorado are declared to be the obligation of the state. The state is liable for indemnification of civil defense workers for damage done to their property or for judgments arising out of their compliance with the civil defense act. Indemnification in cases of wilful misconduct, gross negligence or bad faith is excluded. Similarly, death or injury of enrolled civil defense workers is excluded from this liability of the state, because special compensation benefits are made available to them.

Wisconsin

Political subdivisions of the state are required to indemnify their civil defense workers against any tort liability to third persons incurred in the scope of civil defense employment. Civil defense workers not acting as such for a private employer are deemed to be employees of the political subdivision and thereby entitled to compensation benefits, except death benefits. If loss of equipment, plus indemnification of civil defense workers for their third party liability, plus workmen's compensation benefits for civil defense workers, exceeds one dollar per capita of the population of a political subdivision, the state is to reimburse the political subdivision for such excess. It is not clear whether the political subdivision's right to reimbursement applies irrespective of payments made on its behalf by a liability insurer, or as to the rights of such insurer to share in the reimbursement.

B.

EFFECT OF IMMUNITIES ON WORKMEN'S COMPENSATION

With regard to workmen's compensation rights, it should be noticed that all of the statutes affording governmental immunity from tort liability arising out of compliance with these civil defense statutes, except those of Connecticut, Hawaii and Ohio, provide that the immunities shall not affect the right of any person to collect compensation benefits. For an example of a typical statute so providing, see the Alabama statute referred to above.

The apparent purpose of this provision is to preserve existing compensation rights to employees of political subdivisions, who would otherwise stand deprived of them by the immunity. It is doubtful that this provision would have the effect of making voluntary civil defense workers newly entitled to compensation benefits, despite their voluntary status. Similarly, private employers should not be affected by this preservation of compensation rights because the immunity to which such preservation is an exception does not relate to their activities, and because, by definition, they are not part of the civil defense organization to whom the immunities apply.

It can be a moot question as to whether injuries occur within the scope of one's employment by a town, or not. The addition of civil defense duties to the regular duties of a town employee such as a teacher or a policeman undoubtedly enlarges the exposure to compensable injuries. On the other hand, the mere fact that compensation rights are preserved should not mean that employments formerly not covered now must be considered to be compensable.

As noted above, compensation rights are not expressly preserved in the acts of Connecticut, Hawaii and Ohio. Ordinarily, this might imply that compensation rights for civil defense activities no longer exist for government employees in these jurisdictions. However, Connecticut and Hawaii establish special benefits for civil defense workers, so that compensation has not been eliminated by their immunity statutes. Furthermore, in Ohio such disruption of compensation rights would occur only as to injuries during emergencies declared by the governor.

C.

NEW WORKMEN'S COMPENSATION BENEFITS FOR CIVIL DEFENSE WORKERS

If civil defense activities are carried on as part of a regular compensable employment, either by a governmental employer such as a town (if subject to the existing workmen's compensation act), or by a private employer, injuries arising out of such activities probably would be compensable. This is especially true if compensation benefits have been preserved in the face of the usual governmental immunity for civil defense activities. Furthermore, no special civil defense legislation is necessary to reach this result.

On the other hand, civil defense volunteers, as opposed to employees, would usually not be entitled to compensation because of their status as volunteers. In addition, if an employee is in a non-compensable employment, his activities as a civil defense worker in such employment would not ordinarily put him in a compensable classification. Accordingly, legislation is necessary to afford workmen's compensation benefits to civil defense volunteers or to employees of municipalities whose regular employment is not ordinarily covered. Such legislation exists in the following jurisdictions:

California	New Jersey
Colorado	New York
Connecticut	Utah
Hawaii	Vermont
Massachusetts	Wisconsin

None of this legislation expressly changes the workmen's compensation law so as to include civil defense activities within the scope of private employment. Accordingly, private employers are not concerned with these new benefits, although they still have the problem of determining when civil defense activities by their own employers under their direction are part of their regular employment and are therefore compensable.

This legislation does directly affect governmental employers, however, because it directs the payment of compensation benefits to civil defense volunteers by state and local governments, and because it expressly creates new compensable employments related to governmental civil defense activities.

The burden of paying compensation benefits to civil defense volunteers is an obligation of the state or territory in all of the jurisdictions listed above except as follows:

1. In Hawaii, Utah and Wisconsin, political subdivisions are responsible for their enrolled volunteers, although Wisconsin will reimburse its political subdivisions for payments made to volunteers under certain circumstances.

2. In New York, municipalities must afford compensation benefits to volunteer auxiliary firemen and rescue squad workers during training periods. New Jersey municipalities must pay similar benefits to volunteer firemen, volunteer first aid or rescue squad workers, and volunteer drivers of municipal ambulances, whenever they are injured while engaged in their duties as volunteers. Furthermore, New York municipalities can elect to cover civil defense volunteers for workmen's compensation to the extent that New York state does not cover them under Article 10 of the Workmen's Compensation Law.

In Colorado, Connecticut, Hawaii, New York, Utah and Wisconsin, it is expressly provided that governmental employees engaged in civil defense activities as part of their employment are entitled to workmen's compensation benefits payable by their employer. Since Utah and Colorado require municipalities to insure their compensation liability in their state funds, private insurers are not affected. However, in Connecticut, Hawaii, New York and Wisconsin, it is clear that the scope of compensation which must be afforded by towns to their employees now expressly includes civil defense activities. Insofar as these civil defense governmental employees in these states were formerly excluded from compensation benefits, new coverage including them is necessary to comply with the new laws. In New York, for instance, teachers were not required to be afforded compensation because theirs was an employment which was not mandatory under the workmen's compensation law. Now, however, a town must cover them to the extent that they are engaged in "authorized services related to civil defense."

Most of these statutes affording compensaiton benefits to civil defense workers provide that the benefits payable thereunder shall be reduced by the amount of benefits payable under any federal law. Although

no such federal law has been enacted, there have been a number of proposals in Congress designed to place the burden of losses by enemy action on the federal government.

As noted above, political subdivisions of Hawaii, New York, New Jersey, Utah and Wisconsin are required to assume some of the burden of affording compensation benefits to civil defense volunteers. However, most of the burden of protecting civil defense volunteers, even in these states, rests upon the state government, and in most states no such benefits are payable at all. Furthermore, the new employments related to civil defense which must be covered in these few states are not greatly different from the employments by political subdivisions which formerly were compensable. Accordingly, it does not appear that workmen's compensation rights throughout the nation have been significantly changed in order to afford benefits to civil defense workers as such. It is perhaps too early to forecast a trend, but compensation insurers can derive some comfort from the fact that where compensation rights have been extended to civil defense volunteers, the tendency has been to place this burden upon the state government.

APPENDIX

Civil Defense Statutes

	Citation and Title	*Immunity of Governmental Unit*	*Immunity of Civil Defense Worker*	*Workmen's Compensation for Civil Defense Workers*
Alabama	Act 14, 1st Spec. Sess. 1951; "Alabama Civil Defense Act of 1951."	Yes	Yes	No provision
Arizona	Ch. 21, 1st Spec. Sess. 1942; "Civilian Defense Act." (Sections 64-301 to 64-332, Ariz. Code).	No provision	Yes (1)	No provision
Arkansas	No Act.			
California	Sections 1500-1601 of Military and Veterans Code (Deering's) as amended by Ch. 3, 3rd Extra Sess. 1950, and Ch. 1351, Reg. Sess. 1951. See Chapters 219, 247, 514, 1437 and 1440 of Reg. Sess. 1951; "Civil Defense Act of 1950; California Disaster Act."	Yes (2)	No	Chapters 10 and 10.5, Div. 4, Part 1, Labor Code
Colorado	Ch. 34A, Colorado Statutes Annotated, as amended by Chapters 108, 109, 110, and 111, Reg. Sess. 1951; "Colorado Civil Defense Act of 1950."	Yes (3)	Yes (3)	Ch. 108, Reg. Sess. 1951
Connecticut	Public Act No. 1, Acts 1951, 1st Spec. Sess.	Yes (4)	Yes (4)	Section 14, Public Act No. 1, Acts 1951, 1st Spec. Sess.
Delaware	House Bill 39, Reg. Sess. 1951; "Delaware Civil Defense Act of 1951."	Yes	Yes	No provision
District of Columbia	Ch. 686, Public Law 686, (81st Cong., 2nd Sess.).	Yes	Yes	No provision
Florida	Ch. 26875, Reg. Sess. 1951; "Florida Civil Defense Act."	Yes	Yes	No provision
Georgia	Ch. 86-18, Ga. Code Ann.; "Georgia Civil Defense Act of 1951."	Yes	Yes	No provision
Hawaii	Act 268, Reg. Sess. 1951; "Civil Defense and Emergency Act."	Yes	Yes	Section 13183, Ch. 328, Revised Laws (Act 268, Laws 1951)
Idaho	No Act.			
Illinois	Smith-Hurd Ill. Anno. Statutes, Ch. 127, Sections 269-288; "The Illinois Civil Defense Act of 1951."	Yes	Yes	No provision

	Citation and Title	*Immunity of Governmental Unit*	*Immunity of Civil Defense Worker*	*Workmen's Compensation for Civil Defense Workers*
Indiana	Burns' Indiana Statutes, 45-15, Ch. 268, Reg. Sess. 1951; "Civil Defense Act of 1951".	No provision	No provision	No provision
Iowa	No Act.			
Kansas	Ch. 323, Laws 1951; "Kansas Civil Defense Act of 1951."	Yes (2) (5)	Yes (5)	No provision
Kentucky	No Act.			
Louisiana	R. S. 29:601 to 29:617; Acts 1950, No. 38	Yes	Yes	No provision
Maine	Ch. 298, Laws 1949, (Ch. 11A of Revised Statutes) as amended by House Bill 152 and Senate Bill 117, Reg. Sess. 1951.	Yes	Yes	No provision
Maryland	Ch. 563, Laws 1949, (Sections 41-178 to 41-189 of 1947 Supplement to the Maryland Code) as amended by Chapters 410 and 653, Laws 1951.	No provision	No provision	No provision
Massachusetts	Ch. 639, Laws 1950 as amended by Chapters 486 and 547, Laws 1951; "Civil Defense Act."	Yes (5)	Yes (5)	Ch. 547, Laws 1951
Michigan	Act 83 of 1943 (Ch. 30 Compiled Laws 1948), as amended by Act 203, Laws 1951; see Act 59, 1951 Laws; "Michigan Civilian Defense Act."	Yes	Yes	No provision
Minnesota	Ch. 694, Reg. Sess. 1951; "Minnesota Civil Defense Act of 1951."	No provision	No provision	No provision
Mississippi	Ch. 206, Laws 1942 (Sections 8610 to 8619 of Mississippi Code Annotated); "Mississippi Civilian Defense Council Act."	No provision	No provision	No provision
Missouri	Sections 26.100 to 26.120, Missouri Revised Statutes, 1949; "State Council of Defense Act" (1941).	No provision	No provision	No provision
Montana	Ch. 218, Laws 1951 (Sections 77-1301 to 77-1313 of The Revised Code of 1947); "Montana Civil Defense Act of 1951."	Yes	Yes	No provision
Nebraska	Sections 81-825.01 to 81.829.04 of the 1949 Supplement to the 1943 Revised Statutes; "Nebraska Advisory Defense Committee Act."	No provision	No provision	No provision
Nevada	Sections 6917.01 to 6917.12, Nevada Compiled Laws; "Civilian Defense Act of 1943."	Yes	Yes	No provision
New Hampshire	Ch. 304, Laws 1949; "Civil Defense Act."	Yes	Yes	No provision
New Jersey	Appendix A; 9-1 to A; 9-57 of the R. S. Cum. Supp. 1941 to 1944; Chapters 8, 72 and 276, Laws 1951.	Yes	Yes	Sections 34:15-74, 75, Revised Statutes
New Mexico	Ch. 189, Reg. Sess. 1951; "New Mexico Civilian Defense Act." (Sections 66-1801 to 66-1814, New Mexico Statutes).	No provision	No provision	No provision
New York	Chapters 784, 785 and 786, Laws 1951; "New York State Defense Emergency Act."	Yes	Yes	Ch. 788, Laws 1951

	Citation and Title	*Immunity of Governmental Unit*	*Immunity of Civil Defense Worker*	*Workmen's Compensation for Civil Defense Workers*
North Carolina	Sections 166-1 to 166-13 of the North Carolina General Statutes; "North Carolina Civil Defense Act of 1951."	No provision	No provision	No provision
North Dakota	Ch. 228, Laws 1951.	No provision	Yes	No provision
Ohio	Sections 5291 to 5303 of Baldwin's Ohio Code Service.	Yes (4)	Yes (4)	No provision
Oklahoma	Title 74, Sections 9.3 to 9.5 of the 1949 Cumulative Supplement to Oklahoma Statutes.	No provision	No provision	No provision
Oregon	Ch. 434, Laws 1949, as amended by Ch. 571, Laws 1951; "Oregon Civil Defense Act of 1949."	Yes (4)	Yes (4)	No provision
Pennsylvania	Ch. 4, Reg. Sess. 1951; "State Council of Civil Defense Act of 1951."	Yes	Yes	No provision
Rhode Island	Ch. 2641, Laws 1950, as amended by Ch. 2669, Laws 1951; "State Emergency Defense Act of 1950."	No provision	No provision	No provision
South Carolina	Act 896, Laws 1950; "South Carolina Civil Defense Act."	No provision	No provision	No provision
South Dakota	Ch. 285, Laws 1951; "State of South Dakota Civil Defense Act of 1951."	Yes	Yes	No provision
Tennessee	Sections 5755.39 to 5755.57 of the 1951 Supplement to the Tennessee Code.	No provision	No provision	No provision
Texas	No Act.			
Utah	Ch. 33, 2nd. Spec. Sess. 1941, as amended by Ch. 104, Reg. Sess. 1951 (Sections 82C-5-1 to 82C-5-21, Utah Code Annotated 1943); "State Council of Defense Act."	Yes (5)	Yes (5)	Section 82C-5-17, Utah Code
Vermont	Senate Bill 66, Reg. Sess. 1951; "Vermont Civil Defense Act of 1951."	No provision	No	Section 17, Vermont Civil Defense Act of 1951
Virginia	Sections 44-141 to 44-146 of the Code of Virginia, 1950. (Laws 1942, p. 9).	No provision	No provision	No provision
Washington	Ch. 178, Reg. Sess. 1951; "Washington Civil Defense Act of 1951."	Yes	Yes	No provision
West Virginia	Ch. 162, Laws 1951, Sections 1264(24) to 1264(39) of the 1951 Supp. to the West Virginia Code of 1949.	Yes	Yes	No provision
Wisconsin	Ch. 443, Reg. Sess. 1951, Sections 20.019 and 21.024 of the Wisconsin Statutes.	No (3)	Yes (3)	Section 21.024 (7) Wisconsin Statutes
Wyoming	Ch. 104, Reg. Sess. 1951, Sections 30-801 to 30-818 of the Wyoming Compiled Statutes; "Wyoming Civil Defense Act of 1951."	Yes	Yes	No provision

NOTES

(1) If a member of civilian defense council as defined.
(2) Immunity limited to claims for personal injury to or damage to property of enrolled civil defense volunteers.
(3) State must indemnify civil defense workers or political subdivisions for loss arising out of their civil defense activities.
(4) State must defend civil actions against civil defense workers or political subdivisions arising out of their civil defense activities.
(5) Immunities apply only during emergencies as defined.

TREASURER'S REPORT

FORREST S. SMITH, JERSEY CITY, N. J.

FOR THE FISCAL YEAR ENDED OCTOBER 31, 1951

THERE is set forth below the statement of cash receipts and disbursements for the period November 1, 1950 to October 31, 1951, along with certificate of the auditors.

Due to the fact that there was not included $3,160.00 in fees for the 1951 Convention received during the prior year, the statement does not disclose the amounts of receipts and disbursements applicable to that particular year. For this reason, the supplementary statement below is made. The excess of actual disbursements over receipts in the fiscal year ended October 31, 1951 was $2,574.32, but in fact there was an excess of receipts over disbursements applicable to that period of $585.68.

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS

BALANCE AT OCTOBER 31, 1950:			
Cash:			
On demand deposit		$ 3,531.75	
United States Bonds, Defense Series G; at cost:			
Maturing February 1954	$ 5,000.00		
Maturing February 1955	10,000.00	15,000.00	$18,531.75*
RECEIPTS:			
Dues and admission fees	$21,810.00		
Registration fees for 1951 convention	$1,460.00		
Less refunds	900.00	560.00	
Subscription to Journal		341.04	
Interest		375.00	$23,086.04
DISBURSEMENTS:			
Secretary's office expense	$ 4,458.91		
Treasurer's office expense	1,292.47		
President's expenses	357.34		
Journal expense	8,739.21		
Miscellaneous	42.54		
Mid-winter meeting	4,989.92		
1951 convention	5,779.97	25,660.36	
Excess of expenditures over receipts			($2,574.32)
BALANCE AT OCTOBER 31, 1951			$15,957.43
ACCOUNTED FOR AS FOLLOWS:			
Cash on demand deposit		$ 957.43	
United States Bonds; Defense Series G; at cost:			
Maturing February 1954	$ 5,000.00		
Maturing February, 1955	10,000.00	15,000.00	
		$15,957.43	

SUPPLEMENTARY

Excess of expenditures over receipts for the year, as above	($ 2,574.32)
Add registration fees for 1951 convention, received in prior period	3,160.00
Excess of receipts over expenditures applicable to activities of the year ended October 31, 1951	$ 585.68

( ) Indicates red figures.

*Includes $3,160.00 registration fees for 1951 convention received in prior period.

We have examined the statement of cash receipts and disbursements of the INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL, for the year ended October 31, 1951. In connection therewith, we examined or tested accounting records of the Association and other supporting evidence by methods and to the extent we deemed appropriate.

In our opinion, the accompanying statement of cash receipts and disbursements presents fairly the recorded cash transactions of the INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL, for the year ended October 31, 1951.

ERNST & ERNST.

New York, N. Y.
November 27, 1951

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(*For Index to articles and reports appearing in Journals for period 1947 through 1950 see January, 1951 issue of Insurance Counsel Journal. For articles and reports from 1934 through 1946, see general index in pamphlet form).

REPORTS OF COMMITTEES

AUTOMOBILE INSURANCE LAW—
Report of Automobile Insurance Law Committee—Vol. XVIII, October, 1951, p. 342.

AVIATION INSURANCE LAW—
Report of Aviation Law Committee, Vol. XVIII, October, 1951, p. 370.

CASUALTY INSURANCE
Report of Casualty Committee, Vol. XVIII, October, 1951, p. 374.

FIDELITY AND SURETY LAW—
Report of Fidelity and Surety Law Committee, Vol. XVIII, January, 1951, p. 46.
Report of Fidelity & Surety Law Committee, Vol. XVIII, October, 1951, p. 391.

FINANCIAL RESPONSIBILITY
Report of Financial Responsibility Laws Committee, Vol. XVIII, October, 1951, p. 392.

FIRE AND MARINE—
Report of Fire and Inland Marine Committee, Vol. XVIII, October, 1951, p. 397.

HEALTH INSURANCE—
Report of Health and Accident Insurance Committee, Vol. XVIII, October, 1951, p. 398.

HIGHWAY SAFETY—
Report of Highway Safety Committee, Vol. XVIII, October, 1951, p. 399.

LIFE INSURANCE—
Report of Life Insurance Committee, Vol. XVIII, January, 1951, p. 58.
Report of Life Insurance Committee, Vol. XVIII, October, 1951, p. 403.

MALPRACTICE—
Report of Malpractice Committee, Vol. XVIII, October, 1951, p. 413.

MARINE INSURANCE—
Report of Marine Insurance Committee, Vol. XVIII, January, 1951, p. 67.
Report of Marine Insurance Committee, Vol. XVIII, October, 1951, p. 426.

MEMORIAL COMMITTEE—
Report of Memorial Committee—Vol. XVIII, July, 1951, p. 218.

PRACTICE AND PROCEDURE—
Report of Practice and Procedure Committee—Vol. XVIII, July, 1951, p. 240.

WORKMEN'S COMPENSATION—
Report of Workmen's Compensation Committee, Vol. XVIII, January, 1951, p. 70.

Report of Workmen's Compensation Committee, Vol. XVIII, October, 1951, p. 433.